Petition

81-2095

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No. 81-

In the Supreme Court of the United States

October Term, 1981

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,

Petitioners,

v.

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., and MOOKS, INC., all California corporations,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352
(213) 352-2069

Attorney for Petitioners.

QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the Trial Court's award of an attorney's fee in a copyright infringement lawsuit, made pursuant to the authority of 17 U.S.C., § 116,[1/] where the alleged infringers were members of the Santa Ana City Council and the party unsuccessfully claiming an infringement was the producer and exhibitor of 5 motion picture films, which had been issued a "Certificate of Registration of a Claim to Copyright" by the Register of Copyrights of the United States Copyright Office and which were held to be obscene under federal standards at the copyright infringement trial; where the alleged infringement consisted solely of making sound and

1/ At the time of the proceedings, 17 U.S.C., §116 provided:

> "116. Costs - Attorney's fees.- In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs." (Our emphasis.)

photographic copies of such films in the course of their official duties as City Councilmen, for the purpose of providing the City Council with the specific factual information it was required to have under Santa Ana Ordinance NS-1287,[2/] in determining whether the City should commence legal action under the City ordinance and State Statute to abate their exhibition as public nuisances.

2/ Santa Ana Ordinance NS 1287 and Resolution 76-134 are set forth at Appendix C to this petition. Section 12-103(c) of Ordinance NS 1287 provides:

> "Sec. 12-103. Action to be Taken by City Council.- Upon a specific finding that a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance, shall provide for the following by Resolution:
>
> (C) Set forth the evidentiary facts considered by the City Council in arriving at its factual determination that a lewd film or films, as defined in Section 12-101(A) hereof, are publicly exhibited or possessed for exhibition at such real property and are public nuisances as declared herein, including a recitation of the particular sexual conduct and acts which the City council finds are patently offensive."

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Jartech Inc., et al. v. Clancy, et al., C.A. No. 80-5010, entered on January 25, 1982, which reversed the "Judgment for Costs Including Attorney's

Fees on Claim" awarded to the Defendants under 17 U.S.C., section 116, following a judgment on jury verdicts (special) for the Defendants in a copyright infringement lawsuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in Jartech, Inc. et al. v. Clancy, et al., 666 F.2d 403. A copy of the opinion of the Court of Appeals appears at Appendix A-1 to A-22 to this petition. A copy of the trial court's decision and order for findings of fact, conclusions of law and judgment re motion for costs taxable by the Court and Attorney's fees, the Court's findings of fact and conclusions of law, and the judgment for costs including attorney's fees on claim appears at Appendix B-1 to B- 25.

JURISDICTION

The opinion of the Court of Appeals was filed on January 25, 1982. On April 12, 1982, Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including May 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rules 17.1(a) And 17.1(c) of the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

17 U.S.C., section 116 (previously) provided:

> "116. Costs-Attorney's fees. - In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. (July 30, 1947, c. 391, § 1, 61 Stat. 665.)"

17 U.S.C., section 505 of the Copyright Law Revision of 1976 (effective

Jan. 1, 1978) provides:

> "§ 505. Remedies for infringement: Costs and attorney's fees
> In any civil action under this title the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title the court may also award a reasonable attorney's fee to the prevailing party as part of the costs. (Added Oct. 19, 1976, P. L. 94-533, Title I, § 101, 90 Stat. 2586.)"

STATEMENT OF THE CASE

This is one of three petitions seeking review of the separate appeals from the three trial court judgments in this copyright infringement lawsuit. The petition herein seeks a reinstatement of the trial court's judgment which awarded attorney's fees to the Defendants as the "prevailing party" in the copyright infringement action, pursuant to 17 U. S.C. § 116. That section provided that " the Court may award to the prevailing

party a reasonable attorney's fee as part of the costs." The Defendants are the "prevailing party" under both the trial court's judgment and the judgment and opinion of the Court of Appeals.

In awarding attorney's fees to the Defendants, the trial court made specific findings of fact and conclusions of law (See Appendix B-11 through B-22). Conclusions of Law 1 and 2 read:

> "CONCLUSIONS OF LAW
> 1. The defendants are the prevailing parties.
> 2. The plaintiffs filed this lawsuit in order to vex and harass the defendants. It was not a good faith effort fairly to resolve the legal questions presented. Consequently, an award of attorneys' fees to the prevailing party is appropriate."

In reversing the award of attorney's fees, the Court of Appeals gave the following reasons:

> ". . . the Mitchells' prosecution of obscenity as a defense was not only not frivolous, but their position has ultimately been

> accepted. Furthermore, the Mitchells have offered explanations for their prosecution of this suit, which, in the opinion of this court, reflect a sincere interest in the settlement of close legal questions. The plaintiffs initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal.
>
> In light of the foregoing, the trial court's award of attorney's fees is reversed."

Petitioners base their right to a reinstatement of the trial court's judgment awarding attorney's fees on three grounds. The first ground is that the underlying rationale for the Court of Appeals' judgment of reversal is in error, in that obscenity is a defense to this copyright infringement lawsuit. That claim is concurrently being presented to this Court in a separate Petition for a Writ of Certiorari as to the Judgment on the jury verdicts for the defendants which was entered on December 21, 1978, and the Plaintiff's separate appeal

from that judgment. The second ground is that,irrespective of whether obscenity is or is not a defense to such a copyright infringement complaint, nevertheless, under prevailing law, the trial court possessed the discretion to make such an award and such award did not constitute an abuse of discretion because, under one view of the trial court evidence, the Defendants' right to such an award was clearly proven. The third ground is that there is no existing case law which can be said to be controlling on the trial facts herein. Congress has placed only one restriction on the Court's equitable power to award an attorney's fees to the defendant in a copy right infringement lawsuit; that is, that the defendant be the "prevailing party." There is no justification for the Court of Appeals to engraft a court created restriction on a trial court

record such as this, where the subject matter has been held to be obscene under federal standards, and where the Defendants' copying was not for commercial reasons and was "fair use" as a matter of law, and was performed under the compulsion of a governmental duty to abate public nuisances.

STATEMENT OF FACTS

A. Background: The Controversy in the State Court.

Petitioners request this Court to take judicial notice of the justiciable facts and the nature of the state controversy between the same parties, decided by this Court in Edward Cooper, City Attorney of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, etc., et al., ___ U.S. ___, 70 L. Ed.2d 262, 102 S.Ct. ___ (Nov. 30, 1981), 28 U.S.C. § 201. That case is now before the California Supreme Court on the City Attorney's petition for a hearing after a second decision by the Court of Appeal, Fourth District, Division 2, in People ex rel. Cooper

v. Mitchell Brothers' Santa Ana Theater, et al., 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (Feb. 18, 1982).

On June 16, 1975, James Gish, the theater manager of the Mitchell Brothers' Four Star Theater on Wilshire Boulevard in Los Angeles, submitted an application to the City of Santa Ana, on behalf of M.B.F.G. Theater Circuit, a division of Cinema 7, Inc., for a business license to operate the Mitchell Brothers' Santa Ana Theater at 1565 West 17th Street, Santa Ana, California. On July 14, 1975, United Artist Theater Circuit, Inc., executed a 5 year lease of the premises at 1565 West 17th Street to M.B.F.G. Theater Circuit and, by addendum to the lease, dated August 1, 1975, executed by James Mitchell and Artie Mitchell, Cinema 7, Inc., became the leasee in place of M.B.F.G. Theater Circuit.

Thereafter, the City of Santa Ana issued a business license, and on September 3,

1975, the Mitchell Brothers' Santa Ana Theater commenced its operations under the new management. The first program offered a triple feature: "Sodom and Gomorrah," "Behind the Green Door," and "Resurrection of Eve," (see Appendix D-1 thru D-97 to this petition), all three of which were produced, directed, and photographed by James Mitchell and Artie Mitchell, and distributed and exhibited by them in their finished form at their own chain of theaters, acquired by them during the period 1973-1975, and operated as a theater chain under the name, "M.B.F.G. Theater Circuit." At the time they commenced their Santa Ana operations, they openly advertised their theaters in Northern California as "Mitchell Brothers' Porno Theaters" and the films which they had produced, directed, and photographed as "hard-core."

The Mitchell Brothers' Santa Ana Theater is located in the Honer Plaza Shopping

area, and adjacent to the First Christian Church, Orange County Social Service Department, Bank of America, Ralphs Market, Sav-On Drugstore, Montgomery Ward, Imperial Bank, and across the street from the Santa Ana Community Junior College. The triple feature ran continuously from 11:00 A.M. to 11:00 P.M., seven days a week, from September 3, 1975 through January 15, 1976. During that time it became a matter of public discussion on the agenda of the City Council.

In November of 1975, City Attorney Keith Gow employed special legal counsel to assist him, and a special investigator, Robert McGuire, who paid the admission price of $5.00 and began making regular photographic and sound surveillances of the programs being exhibited at the theater. The special counsel was then employed by the City of Duarte in a motion picture theater public nuisance abatement case involving Duarte

City Ordinance 369, which was subsequently approved as a procedural ordinance in People ex rel. Camil, City Attorney of Duarte v. Buena Vista Cinema, 57 Cal.App.3d 497, 503 (1976).

Thereafter, public hearings were held and, on January 19, 1976, the City Council duly enacted Ordinance NS-1287, a copy of which appears at Appendix C to this petition, which was patterned after City of Duarte Ordinance 369. The City Council also approved an "Agreement for Legal Services" for James J. Clancy to assist City Attorney Keith Gow "in connection with litigation to abate conditions within the City, determined by the Council under the provisions of Ordinance No. NS-1287 to be a public nuisance."

On January 15th, four days before the adoption of Ordinance N.S. 1287, (which occured immediately after its second reading), the Defendants stopped exhibiting their triple feature (which had run for 4 months) and

commenced exhibiting other pornographic films.

On October 4, 1976, a unanimous Santa Ana City Council duly enacted N.S. 1325 as an emergency ordinance to amend N.S. 1287 to apply a correction "required by the decision of the Court of Appeal in People ex rel. Camil v. Buena Vista Cinema."

Under the amendment, the City Council "upon a specific finding that a public nuisance" existed under the abatement ordinance, was required: "to order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the Court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order." The Mitchell Brothers became aware of the passage

of the above ordinances through newspaper reports of the same. (See deposition of Lynn O'Dell, infra).

B. The Circumstances Surrounding The Filing Of The Federal Copyright Infringement Lawsuit On October 12, 1976.

The City Council's actions, in and about this time, were reported in Santa Ana Register news articles dated September 22, 1976, October 6 and October 13, 1976 under the by-line "By Lynn O'Dell" (See deposition of Lynn O'Dell taken on February 2, 1977 and filed with the Court on March 7, 1977 in support of the Defendants' motion to file an amended counterclaim.) In the deposition of Lynn O'Dell taken on February 2, 1977, she stated that she authored the Register news article dated September 22, 1976 and October 6, 1976 under the by-line "By Lynn O'Dell" and that the Mitchell Brothers knew of the news articles. (See O'Dell deposition at page 7, line 19 et seq.). In the September

22, 1976 news item (See Exhibit "A" to O'Dell deposition), she reported the fact that the City Council was meeting in an executive session, pursuant to a City Ordinance dealing with "lewd" films at a public theater:

> "Under a city ordinance aimed at ridding Santa Ana of its two adult theaters, councilmen must sift through the photographs and determine if the movie scenes are 'lewd'." Originally, if councilmen pronounced the scenes lewd, a civil suit would be filed against the theater and the theater would be closed down as a 'public nuisance'." (Our emphasis.)

and,

> "'There just wasn't enough time. We'll have to go into it again', said Gow when he was asked if councilmen had made a decision in the 35-minute executive session.'" (Our emphasis.)

In the October 6, 1976 news item she reported the fact that the ordinance had been before that body for some time:

> "An urgency ordinance amending the city's as yet unused antipornography law was adopted this week by city councilmen. The amendment brings the eight month old ordinance into conformance with a recent state Supreme Court ruling on a similar city law . . ." (Our emphasis.)

She also reported the fact that the City Council members had not yet reached a decision on the matter.

> "Councilmen have met twice in closed-door sessions to review evidence an outside attorney has been gathering since January on X-rated films shown at Mitchell Brothers' Honer Plaza Theater . . . Gow said Monday that councilmen have not yet reached a decision on whether the films are lewd or if they will file a lawsuit under the ordinance. . . ." (Our emphasis.)

The federal copyright action herein was filed on October 12, 1976 on behalf of three corporate plaintiffs: Jartech, Inc., Anatuna, Inc., and Cinema 7, Inc. The original action named 5 persons as individual defendants; being four members of a seven member Santa Ana City Council, Gordon Bricken, James E. Ward, David L. Brandt and David F. Ortiz, and the private attorney employed by the City as special counsel in the public nuisance abatement matter, James J. Clancy, and alleged a copyright interest in three of the films herein involved: "Behind the Green Door", "Resurrection of Eve" and "Sodom and

Gomorrah". (See Appendix D-1 thru D-97 to this petition).

In a third article, which appeared in the Register on October 13, 1976, reporting on the filing of the copyright infringement lawsuit (See Exhibit "B" to deposition), Lynn O'Dell reported on a conversation with Artie Mitchell regarding the lawsuit, in which he told her that the plaintiffs were not interested in the damages aspect of the infringement lawsuit:

> "'We'd be glad to let them (councilmen) see the movies free anytime they want' said Artie Mitchell of Mitchell Brothers. 'But we do object to them surreptitiously taking pictures of our films'. . . . If they collect any money through the lawsuit, Mitchell said it would be given back to the city. . ."

Other statements made by Artie Mitchell, as reported in the October 6, 1977 article, indicate that Mitchell knew the city councilmen were acting as councilmen under the city ordinance. The federal action named only four of the city councilmen as individuals, and was filed and served less than a week

after adoption of the urgency ordinance and two weeks before the City Council was to vote on the Mitchell Brothers' Santa Ana Theater.

Lynn O'Dell stated that the day before the lawsuit was filed:

> "A fellow who does P.R. for the Mitchell Brothers . . . told me that he just wanted to let me know that they intended to file a lawsuit against the city. And I explained that our policy was not to do stories until the lawsuit actually had been filed. And I don't remember whether it was this conversation or the next day or whatever, but anyway, he said that they would be in Los Angeles to file the lawsuit and they would stop by the Register and bring me a copy of the lawsuit. . . ." (O'Dell deposition, page 11, lines 17-19).

Thereafter Lynn O'Dell met with Artie Mitchell and Bill Boyer and Jim Boyer in the Register office (deposition at pages 15) at which time she discussed with them the Register articles dated September 22 and October 6 and their knowledge of those articles. O'Dell stated in her deposition (O'Dell deposition at pp. 20-21):

> "they said well, they had heard or read about it in the paper or something that the council had been having executive sessions and looking at these pictures and that the newspaper story said that the pictures were taken by you or by people employed by the City and that their reason for filing a lawsuit was that they felt this was an infringement of their copyright, so we did discuss this story in that I asked them why they filed the lawsuit." (Our emphasis.)

Lynn O'Dell asked Artie Mitchell at that interview why only Gordon Bricken, James B. Ward, David L. Brandt and David F. Ortiz had been named in the lawsuit and was told:

> "they told me the reason they only named those people was that they had understood those were the ones that were in the executive session." (Deposition, page 24, line 21).

At page 28, line 22, O'Dell also stated:

> "I remember we were all sitting down looking at the front of it and I remember one of them saying "These people are City Councilmen' and I said "Yes, I know.'" (Our emphasis.)

(C) The Trial Of The Federal Copyright Infringement Lawsuit.

On May 24, 1977, the date originally set for trial of the matter, Plaintiffs mov-

ed to dismiss the federal copyright infringement action pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and such motion was granted by the Court on July 29, 1977, conditioned upon payment by Plaintiffs of costs and attorney's fees in the amount of $9,778.76. Thereafter, Plaintiffs moved the Court for an order setting aside the order of dismissal and for an order permitting the filing of an amended complaint which was granted by order of the Court on October 6, 1977.

Plaintiffs' First Amended Complaint added Mooks, Inc., as an additional Plaintiff and alleged a copyright interest in two additional films: "Inside Marilyn Chambers" and "The Autobiography of a Flea". (See Appendix D-79 thru D-133 and D-157 thru D-185 to this Petition). The Defendants' joint answer was filed on October 26, 1977.

Pursuant to order of Court, the Defendants on May 9, 1978 filed a verified coun-

terclaim. The counterclaim named one additional film, "C.B. Mamas" (see Appendix D-135 thru D-155 to this Petition), as being the subject of a copyright controversy and asked for declaratory judgment and other relief. The counterclaim also named James Mitchell and Artie Mitchell and Mitchell Brothers' Film Group, a general partnership, as additional defendants, alleging their interest as principals and alter egos and sought a judgment against them also. On or about July 3, 1978, the Plaintiffs and Counter-defendants filed their verified answer to the counterclaim.

The case proceded to trial in November and December of 1978. On December 14, 1978, the issues presented in the First Amended Complaint for Copyright Infringement were submitted to the jury with the Court reserving the matter of the counterclaim for its own decision. The jury rendered its special verdict on the same day (C.T. 863-880) that:

(1) each of the five motion pictures was obscene, (2) each defendant was intentionally responsible for the copying of each motion picture, (3) none of the defendants realized any profit from the copying, (4) the use made by the defendants of the copies was a fair use, and (5) the individual defendants did not infringe the copyrights of the five motion pictures (C.R. 140 at Finding of Fact No. 6). Thereafter, on December 21, 1978, judgment was entered on the jury verdicts. (C.T. 882).

On January 9, 1978, the defendants served and filed a motion for costs taxable by Court with affidavits and points and authorities in support thereof (CR 101).

On January 12, 1979, plaintiffs filed their notice of appeal to the Ninth Circuit Court of Appeals from the judgment on the jury verdict entered on December 21, 1978 (CR 104).

On Mar. 22, 1979, the Court filed its

"Decision and Order for Findings of Fact, Conclusions of Law and Judgment Re Motion for Costs Taxable by the Court and Attorney's Fees" (CR 119).

On June 29, 1979, the Court, by minute order, granted judgment against the counter-claimants on their counter-claim (CR 134, 135).

On October 31, 1979, the Court filed its findings of fact and conclusions of law and judgment for the defendants on their motion for costs and attorneys' fees (CR 140). Those Findings of Fact and Conclusions of Law are set forth at Appendix B to this Petition. Findings of Fact 2 throught 23 are repeated hereinafter, verbatim. On appeal, the defendants did not challenge the facts as found by the Court. Their only challenge is that the facts as found do not support the conclusion of law that "Plaintiffs filed the lawsuit to vex and harass and that it was not a good faith effort to

fairly resolve the legal questions" (Appellants Opening Brief at page 14, lines 10-15):

(C)(1) Findings of Fact 2 Through 23.

"2. Plaintiffs brought this action for alleged infringement of their copyrights in the following motion pictures:

(a) Jartech, Inc., "Behind the Green Door,"
(b) Anatuna, Inc., "Resurrection of Eve,"
(c) Cinema 7, Inc., "Sodom and Gomorrah - The Last Seven Days," and "Inside Marilyn Chambers,"
(d) Mooks, Inc., "The Autobiography of a Flea;"

arising out of certain photos and sound track recordings taken of the motion pictures which were being shown at the Mitchell Brothers' Santa Ana Theater in Santa Ana, County of Orange, State of California." (CR 140 at para. 2)

"3. Defendant, James J. Clancy, was hired by the Santa Ana City Council as special counsel to conduct an investigation solely in connection with the drafting, consideration and adoption of a public nuisance abatement ordinance. (Santa Ana Ordinance No. N.S. 1325, Resolution 76-134)" (CR 140 at para. 3).

"4. In connection with the investigation, an off-duty Los Angeles police officer, Robert McGuire, acting as agent for defendant James J. Clancy and the City Council of Santa Ana, performed services for hire by taking time-

motion photographs and making sound recordings of the above-described pictures as they were exhibited at the Mitchell Brothers' Santa Ana Theater." (CR 140 at para. 4)

"5. At all times complained of, defendants Gordon Bricken, James E. Ward, David L. Brandt and David F. Ortiz were members of a seven member City Council of Santa Ana, County of Orange, State of California, which hired defendant James J. Clancy." (CR 140 at para. 5).

"6. A jury was impaneled at the plaintiffs' request and after trial of the issues rendered its special verdicts that (1) each of the motion pictures listed above is obscene, (2) each defendant was intentionally responsible for the copying of each motion picture, (3) none of the defendants realized any profit from the copying, (4) the use made by the defendants of the copies was a fair use, and (5) the individual defendants did not infringe the copyrights of the above-described motion pictures." (CR 140 at para. 6)

"7. In causing copies of the motion pictures to be made, the defendants acted only in their official capacities." (CR 140 at para. 7).

"8. The motion pictures listed above were copied extensively for the use of the City Attorney and City Council in determining whether to bring nuisance abatement suits to stop exhibition of the pictures and operation of the Santa Ana Theater." (CR 140 at para. 8).

"9. No commercial use was made of the time-motion photos and sound track re-

cordings which were taken and made of the listed motion pictures." (CR 140 at para. 9).

"10. Plaintiffs filed this suit only after defendant City Council members had hired the defendant Clancy to conduct an investigation in connection with the drafting and consideration of a public nuisance abatement ordinance." (CR 140 at para. 10).

"11. The City of Santa Ana amended Ordinance N.S. 1287 on October 4, 1976, to provide a procedure for the abatement of public nuisances, requiring the City Attorney to take action to abate a public nuisance upon a finding by resolution of the City Council that a public nuisance exists. Ordinance N.S. 1325." (CR 140 at para. 11).

"12. The plaintiffs filed this lawsuit on October 12, 1976." (CR 140 at para. 12).

"13. The City of Santa Ana adopted a resolution declaring the Santa Ana Theater to be a public nuisance on October 26, 1976." (CR 140 at para. 13).

"14. The four members of the City Council who were named as defendants were sued in their individual capacities; three other members were not named as defendants." (CR 140 at para. 14).

"15. The City of Santa Ana was not named as a defendant." (CR 140 at para. 15).

"16. Robert McGuire, who performed his service for hire and actually took the time-motion studies and made the record-

ings, was not named as a defendant." (CR 140 at para. 16).

"17. The chronology of events leading to the Santa Ana resolution declaring the Santa Ana Theater to be a public nuisance, and to the filing of this action, as well as the plaintiffs' careful choice of defendants, leads to the conclusion that the plaintiffs filed this lawsuit in anticipation of subsequent action to be taken by the City of Santa Ana in order to intimidate the members of the Council in the performance of their official duties insofar as plaintiffs' interests in these motion pictures and the Santa Ana Theater might be concerned." (CR 140 at para. 17).

"18. When they filed this lawsuit, the plaintiffs knew that the copyrightability of obscenity would be an issue, that this issue had been decided against the same real parties in interest in a recent district court case in Texas (Mitchell Brothers Film Group, et al. v. Cinema Adult Theater, et al., Civil No. CA-3-74-645-D), and that an appeal from this decision was pending in the Fifth Circuit. The plaintiffs proceeded to file this lawsuit and then urged this Court to stay this action pending the Fifth Circuit decision." (CR 140 at para. 18).

"19. At the hearing on this matter, plaintiffs' counsel was able to advance no persuasive reason for the naming of Santa Ana's special counsel as an individual defendant. The clear inference is that the plaintiffs intended to inhibit any professional action that Mr. Clancy might take in the future in con-

nection with this matter. In fact, the City of Santa Ana was compelled to associate new counsel for the trial of this action. (CR 140 at para. 19).

"20. It would be inequitable to place the entire burden of the costs of this litigation on the taxpayers of Santa Ana." (CR 140 at para. 20).

"21. On January 19, 1976, the City of Santa Ana, acting through its City Council, entered into an "Agreement for Legal Services" with the defendant James J. Clancy to defend the City in any litigation arising out of Ordinance No. N.S. 1287. Said contract called for the payment of $50.00 per hour of attorney services, plus incidental out-of-pocket expenses. On October 22, 1976, the City instructed the defendant James J. Clancy to undertake the defense of the four City Councilmen who were named individually as defendants, pursuant to the terms and conditions of said agreement." (CR 140 at para. 21).

"22. The hourly rate of $50.00 plus reimbursement for out-of-pocket office expenses is a reasonable amount based on rates charged by attorneys of comparable skill in the area." (CR 140 at para. 22).

"23. In support of their fee application, the defendants have filed affidavits setting forth an itemized account of the time spent by the attorneys James J. Clancy and Larry Parrish in defending against the complaint. Based upon the accounts submitted and after consideration of the objections to the application and the comments in its support, the Court finds that $10,417.24

> is a reasonable fee for the services of James J. Clancy in defense against the complaint, that $3,391.26 is reasonable reimbursement for out-of-pocket costs and expenses, that $7,000.00 is reasonable fee for the services of Larry Parrish in defense against the complaint and that $1,399.99 is reasonable reimbursement for his out-of-pocket costs and expenses." (CR 140 at para. 23).

On December 26, 1979, plaintiffs filed a Notice of Appeal of the Judgment for Costs.

Plaintiffs' appeals from the judgment entered on the special verdicts returned by the jury and from the judgment awarding attorney's fees to the defendants, and the defendants' appeal from the trial court's dismissal of the counterclaim were consolidated for oral argument. On January 25, 1982, the Court of Appeals filed its opinion, deciding the three appeals.

The Court of Appeals reversed the trial court's judgment which awarded attorney's fees to the defendants, upon the following analysis: (1) that an award of attorney's fees to a prevailing defendant "represents a penalty for the institution of a frivolous or bad faith suit"; (2) that "the Mitchells' prosecution of obscenity as a defense was . . . not frivolous"; and (3) "the Mitchells' have offered explanations for their prosecution of this suit, which in the opinion of this Court, reflects a sincere interest in the settlement of close legal question. The plaintiffs initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal."

SUMMARY OF ARGUMENT

1. The Court of Appeals' conclusion that obscenity is not a defense to a copyright infringement lawsuit is error. If that is so then, a fortiori, the judgment disallowing an attorney's fee must be reversed.

The weight of authority of copyright case law holds that obscene material may not be copyrighted. The Court of Appeals' contrary holding is patently in conflict with other federal statutes and cardinal rules of statutory construction and this Court's decision in U.S. v. 37 Photographs that matter which is obscene under federal standards is contraband.

The Court of Appeals' application of "pragmatism", because of certain conflicts which the court perceives will arise out of the individual state's application of Miller

v. California, totally ignores this Court's expression in Smith v. U.S. that no such conflict can exist.

The Court of Appeals' refusal to follow stare decisis and to apply cardinal rules of statutory construction is a sufficient abuse of the appellate process to warrant this Court's power of supervision under Rule 17.1(a)

2. The Court of Appeals has erroneously interfered with the "judicial discretion," which Congress assigned the trial judge in 17 U.S.C. Section 116, to make an attorney's fee award to the "prevailing party."

An appellate court may only interfere as to an "abuse of discretion".

Under both the trial court and the Court of Appeals' decisions, the defendants are the "prevailing parties." The single issue is whether the trial court has abused its discretion.

On its face, the Court's opinion cannot be interpreted as a finding of abuse of discretion and will not support a conclusion that the trial court "abused its discretion". In effect, the only thing that the Court has said is: "This Court has a different 'opinion' of the explanation given by the Mitchells'".

The concept of "discretion" implies that the trial court has an area of choice. The trial court need not have chosen the best positive alternative or that which the appellate court would have chosen in the first instance - its choice need only be reasonable.

The relevant factors in applying "judicial discretion" in the case of a "prevailing" defendant in a copyright infringement lawsuit are: (1) whether the plaintiffs' claim is so lacking in merit as to present no arguable question of law or genuine issue of fact; (2) whether the real

motive is to vex and harass the defendants; and (3) whether the facts establish a case in which the prevailing party should be compensated and the losing party should be penalized.

Even a finding of a good faith claim, however, has been held to afford no defense to a claim for attorneys fees where the losing party deliberately brought the court test with knowledge of his potential liability. A "good faith" claim requires the application of an objective, not a subjective test.

The circumstances surrounding the filing of the federal copyright infringement lawsuit on October 12, 1976, fully support the trial judge's determination that the plaintiffs' motive was to vex and harass the defendants in the performance of their public responsibilities. The plaintiff knew, through reports in the newspaper, that the copies were before the members of the

City Council in executive session for official action and their statements at that time support the conclusion that the lawsuit was filed against the four city councilmen, personally, in order to intimidate them in the performance of their official duties.

The plaintiffs' subsequent motion to dismiss the copyright infringement lawsuit, on the Friday preceeding the date originally set for trial, is further proof that the real motivation in filing the lawsuit on October 12, 1976, was the value of the original service of process at the time the Council was deliberating.

The unreasonableness of the plaintiffs' claim that the subject matter was copyrightable is a major factor to be considered. See, in this regard, the time-motion studies of the 6 films (Appendix D-1 through D-185) which were held to be obscene under federal standards.

The defendants' testimony at the trial was that the film "Behind the Green Door" was the first case in which a copyright claim had been filed on behalf of a sexually explicit film of that nature (hard-core pornography). The plaintiffs' expert also stated that he could not point to any appellate cases which would support his own view that obscene material should be a proper subject for copyright.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS ERRED IN ITS CONCLUSION OF LAW THAT OBSCENITY IS NOT A DEFENSE TO A COPYRIGHT INFRINGEMENT LAWSUIT. A REVERSAL OF THAT JUDGMENT WILL REQUIRE THAT THE JUDGMENT AWARDING AN ATTORNEY'S FEE BE REINSTATED.

In its opinion in Jartech, Inc., et al. v. Clancy, et al., 666 F.2d 403, the Court of Appeals (9th Cir.) held that the Santa

Ana City Councilmen could not assert "obscenity" as a defense to the copyright infringement lawsuit which had been filed against them as individuals. The Court relied entirely upon the decision of the Fifth Circuit in Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir., 1979), cert. denied 445 U.S. 917, 100 S.Ct. 1277, 63 L.Ed.2d 601 (1980), and its own rationale that "Pragmatism further compels a rejection of an obscenity defense".

In a separate Petition for Writ of Certiorari as to the Judgment of the Court of Appeals in Jartech, Inc., et al. v. Clancy, et al., C.A. No. 79-3087 on Plaintiffs' appeal of the judgment of the trial court which was filed on the jury verdicts, Petitioners contend that the Fifth Circuit's decision in Mitchell Brothers' Film Group v. Cinema Adult Theater, supra, is patently in conflict with ruling

copyright case law and the weight of authority which holds that obscene material may not be copyrighted, and 19 U.S.C. Section 1305(a) and U.S. v. 37 Photographs, 402 U.S. 363, which holds that material which is obscene under federal standards is contraband. Further, the Court of Appeals' reliance on its view of "pragmatism" because of certain conflicts it perceives, arising out of the individual state's prospective application of Miller v. California, 413 U.S. 15 and local community standards, totally ignores the expression of this Court in Smith v. U.S., 431 U.S. 291, which demonstrates that no such conflict can exist in relation to an application of the federal statute.

On this ground for reversal, Petitioners' encorporate by reference the arguments made in their Petition for Writ of Certiorari in Clancy, et al. v. Jartech, Inc., et al. (C.A. No. 79-3087),

concurrently being filed with this Petition, which requests this Court to hold that obscenity is a defense to a claim of copyright infringement. If Petitioners' claim in C.A. No. 79-3087 is upheld by this Court, then, a fortiori, the Judgment of the Ninth Circuit disallowing attorney's fees must be reversed.

II

IN REVERSING THE TRIAL COURT'S JUDGMENT WHICH AWARDED AN ATTORNEY'S FEE TO THE DEFENDANTS AS THE "PREVAILING PARTIES", THE COURT OF APPEALS HAS ERRONEOUSLY INTERFERED WITH THE TRIALS COURT'S "JUDICIAL DISCRETION" UNDER 17 U.S.C. SECTION 116. THE TRIAL COURT"S RULING DOES NOT CONSTITUTE AN ABUSE OF DISCRETION.

In enacting 17 U.S.C. Section 116, Congress conferred upon the trial court a "judicial discretion" to make an award of an attorney's fee to the "prevailing party". That discretion may not be interfered with

by an appellate court, except upon a showing of an "abuse of discretion".

On their appeal in the Court of Appeals below, the plaintiffs did not challenge the defendants' status as "prevailing parties" within the meaning of the Copyright Act, 17 U.S.C. Section 106. Further, under the Court of Appeals decision, the defendants are still the prevailing party. This appeal is limited to the single issue of whether the trial court "abused its discretion" in awarding attorney's fees to the defendants.

On its face the Court of Appeals opinion demonstrates that the Court has erroneously interfered with the trial court's "judicial discretion". The Court of Appeals predicated its reversal on the following analysis:

> (1) An award of attorney's fees to a prevailing defendant "represents a penalty for the institution of a frivolous or bad faith suit"; (2) "The Mitchcells' prosecution of obscenity as a defense was . . . not frivolous"; and (3) "The Mitchells have offered

> explanations for their prosecution of this suit, which in the opinion of this Court, reflects a sincere interest in the settlement of close legal questions. The plaintiffs initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal".

Petitioners contend that the above language cannot be interpreted as a finding of abuse of discretion on the part of the trial court. In effect, what the Court has said above is, "We have a different 'opinion' of the 'explanation' given by the Mitchells". That, however, does not say that the trial court's opinion was an "abuse of discretion".

The record herein will not support a conclusion that the trial court abused its discretion. See Point II(B)(1), (2) and (3), infra, at page 48, et seq. Nor have the plaintiffs pointed to anything in the record which would justify that conclusion. The burden of establishing "abuse of discretion" is on the appealing party.

Further, Petitioners contend that it would be fair to describe the Court of Appeals' opinion as having some of the characteristics of "tunnel-vision", which has not taken into consideration all of the relevant evidence that must be considered on that issue. See, for example, Point I, supra, at page 37 and the time and motion studies of the six Mitchell Brothers' films which were held to be obscene under federal standards and were viewed by the trial court.

(A) THE STANDARD OF REVIEW: "ABUSE OF DISCRETION".

When the trial court's discretion has been exercised adversely to a party's interest, its action will be reversed on appeal only if abuse is shown. The concept of discretion implies that the trial court

has an area of choice. See Johnson v. State of Mississippi, 606 F.2d 635 (1979), at 637:

> "The 'abuse of discretion' standard of review contemplates an area in which the district court can act either way, exercising its own discretion, without reversal."

Similarly, the fact that the appellate courts have held that an order in favor of an appellant's position was a proper exercise of discretion under facts comparable to those in the case under consideration does not mean that a contrary order under similar facts constitutes an abuse of discretion. See Johnson v. State of Mississippi, supra, citing Henderson v. Fort Worth I.S.D., 574 F.2d 1210, vacated en banc, 584 F.2d 115 (5th Cir. 1978), cert. denied, 441 U.S. 906, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979):

> "(t)he standard of review being what it is, this case does not hold that it would have been an abuse of discretion to award attorney's fees, only that it was not an abuse of discretion to deny them."

(B) THE "JUDICIAL DISCRETION" AS TO AN AWARD OF ATTORNEY'S FEES, IMPOSED BY 17 U.S.C., SECTION 116 IN THE "USUAL" COPYRIGHT CASE, IS "TO DISCERN THE COURSE PRESCRIBED BY LAW". IN THE CASE OF A PREVAILING DEFENDANT IN A COPYRIGHT LAWSUIT, THE RELEVANT JUDICIAL FACTORS ARE: (1) WHETHER THE PLAINTIFF'S CLAIM IS SO LACKING IN MERIT AS TO PRESENT NO ARGUABLE QUESTION OF LAW OR GENUINE ISSUE OF FACT; (2) WHETHER THE REAL MOTIVE IS TO VEX AND HARASS THE DEFENDANTS; AND (3) WHETHER THE FACTS ESTABLISH A CAUSE IN WHICH THE PREVAILING PARTY SHOULD BE COMPENSATED AND THE LOSING PARTY SHOULD BE PENALIZED.

The public policy considerations which support an award of attorney's fees to a successful defendant where only the issue of "copyright" is presented, is to deter copyright infringement, and to prevent the improper use of the copyright statutes and legal remedies afforded by that statute.

In Cloth v. Hyman, 146 F.Supp. 185 (S.D.N.Y 1956), the Court formulated the following principles regarding the "judicial discretion" which is to be exercised in the implementation of 17 U.S.C., Section 116:

"In exercising judicial discretion, it is well to keep in mind Chief Justice Marshall's classic dictum:

> 'When they (the courts) are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it.' Osborn v. President, etc., of Bank of United States, 1824, 9 wheat. 738, 865, 22 U.S. 738, 865, 6 L.Ed. 204.

In the present case, the statute does not exposit the public policy to be effectuated by the Court's exercise of its discretion in awarding 'a reasonable attorney's fee' to the prevailing party. Nor does the statute suggest a formula or standard of evaluation.

The statute has, however, received extensive judicial exposition. Upon the basis of that authority, these general principles may be formulate:

(1) An attorney's fee is properly awarded when the infringement action has been commenced in bad faith, as where the evidence established that the plaintiff's real motive is to vex and harass the defendant or where plaintiff's claim is so lacing in merit as to present no arguable question of law or genuine issue of fact. Nichols v. Universal Pictures Corporation, 2 Cir., 1930, 45 F.2d 119; Rush v. Oursler, D.C.S.D.N.Y. 1930, 39 F.2d

468; Lowenfels v. Nathan, D.C.S.D.N.Y. 1932, 2 F.Supp. 73; Lewys v. O'Neill, D.C.S.D.N.Y. 1931, 49 F.2d 603; Rose v. Connelly, D.C.S.D.N.Y. 1941, 98 F.Supp. 54.

One of the tests for the exercise of discretion by the Court seems to be that of determining whether the unsuccessful party proceeded in good faith or whether the suit was merely harassing or vexatious. Philadelphia Great Works, Inc. v. Kerotest Mfg. Co., 101 F.Supp. 820 (U.S.D.C.W.D. Penn.) (December 28, 1951). United Artists Television, Inc. v. Fortnightly Corp., 300 F.Supp. 1005.

Even a finding of a good faith claim, however, has been held to afford no defense to a claim for attorney's fees where the losing party deliberately brought the court test with knowledge that, by doing so, they would, if unsuccessful, incur liability for the opposing parties attorney's fees. Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc., 86 F.Supp. 339 (U.S.D.C.S.D.N.Y. July

18, 1949). But note Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 which held that the "claimed invalidity" could not be called "good faith."

Plaintiffs' original motion to dismiss under F.R.C.P. 41(a) (2), made on the date originally set for trial herein, was granted by the U.S. District Court on condition that the defendants be reimbursed in the amount of $9,778.76 for the defendants' costs to the date of dismissal. Thereafter, the plaintiffs elected to reinstate their cause of action and proceed to trial. See, the affidavit of Joseph Rhine in support of plaintiffs' Motion to Set Aside Order of Dismissal, executed on August 26, 1977, and filed with the U.S. District Court on August 30, 1977. (CR 39).

(B)(1) THE REAL MOTIVE OF THE PLAINTIFFS WAS TO VEX AND HARASS THE DEFENDANTS IN THE PERFORMANCE OF THEIR PUBLIC RESPONSIBILITIES.

In the trial court's "Findings of Fact and Conclusions of Law Re Motion for Costs and Attorney's Fees," the Court concluded that "the plaintiffs filed this lawsuit in order to vex and harass the defendants. It was not a good faith effort fairly to resolve the legal questions presented". See Statement of the Case, supra, at page 5) (CR 140 at page 6). The record supports that conclusion of law.

The Federal lawsuit which, on October 12, 1976, was filed against the four councilmen as individuals, was not for the purpose of obtaining damages for the infringement of a valid copyright, but was improper and abusive, being for the purpose of publicizing that lawsuit with the intent to influence the judgment of such defendants

as private persons on a matter which was pending before them for governmental action in their official capacity. This is an improper use of the copyright lawsuit.

The trial evidence fails to show any valid grounds for instituting the infringement action against the four defendants as individuals.

In his finding of fact No. 17, See Statement of Facts, supra, at page 27, the trial judge found, "The chronology of events leading to the Santa Ana Resolution declaring the Santa Ana Theater to be a public nuisance, and to the filing of this action, as well as the plaintiffs' careful choice of defendants leads to the conclusion that the plaintiffs filed this lawsuit in anticipation of subsequent action to be taken by the City of Santa Ana in order to intimidate the members of the Council in the performance of their official duties insofar as plaintiffs' interests in these motion

pictures and the Santa Ana Theater might be concerned". The Lynn O'Dell deposition (CR 32), filed with the U.S. District Court on March 7, 1977, (See Statement of Facts, supra, at page 14), supplies circumstantial proof that the true motivation was to vex and harass. At the time of filing the lawsuit, the Mitchells knew that such persons were acting in their official capacity as councilmen, and were considering such matters at an executive session of the Santa Ana City Council in contemplation of their official duty in relation to possible legal action against the Mitchell Brothers' Santa Ana Theater - a matter which, at that time, was in progress and which had not, as yet, been ruled upon.

The deposition of Lynn O'Dell shows that she authored the two Register news articles dated September 22, 1976 and October 6, 1976, which were published before the lawsuit was filed under the by-line "By

Lynn O'Dell." (See Statement of Facts, supra, at page 14). In the September 22, 1976 news item she reported the fact that the City Council was meeting in an executive session, pursuant to a City Ordinance dealing with "lewd" films at a public theater. (See Statement of Facts, supra, at page 15.) In the October 6, 1976, news item, she reported the fact that the ordinance had been before that body for some time. (See Statement of Facts, supra, at page 15.) She also reported the fact that the City Council members had not yet reached a decision on the matter. (See Statement of Facts, page 16.) Statements made by Artie Mitchell, as reported in the October 6, 1976 article, show that the Mitchells' knew the city councilmen were acting as councilmen under the city ordinance, yet the federal action was brought against four of the city councilmen as individuals, less than a week after adoption of the urgency ordinance and

two weeks before the City Council was to vote on the Mitchell Brothers' Santa Ana Theater Resolution. (See Statement of Facts, supra, at page 17.)

In a third article, which appeared in the Register on October 13, 1976, reporting on the October 12, 1976, filing of a copyright infringement lawsuit (See Statement of Facts, supra, at page 17), Lynn O'Dell reported on a conversation with Artie Mitchell regarding the lawsuit, in which he told her that the plaintiffs were not interested in the damages aspect of the infringement lawsuit. Thereafter Lynn O'Dell met with Artie Mitchell and Bill Boyer and Jim Boyer in the Register office at which time she discussed with them the two Register articles, dated September 22, and October 6, and their knowledge of those articles. (See Statement of Facts, supra, at page 18), O'Dell stated in her deposition (Statement of Facts page 19):

> "they said well, they had heard or read about in the paper or something that the council had been having executive sessions and looking at these pictures and that the newspaper story said that the pictures were taken by you or by people employed by the City and that their reason for filing a lawsuit was that they felt this was an infringement of their copyright, so we did discuss this story in that I asked them why they filed the lawsuit." (Our emphasis.)

Lynn O'Dell asked Artie Mitchell at the interview why only Gordon Bricken, James B. Ward, David L. Brandt and David F. Ortiz had been named in the lawsuit and was told. (See Statement of Facts at page 19.)

> "they told me the reason they only named those people was that they had understood those were the ones that were in the executive session."

O'Dell also stated:

> "I remember we were all sitting down looking at the front of it and I remember one of them saying 'These people are City Councilmen' and I said "Yes, I know.'" (Our emphasis.)

Assuming arguendo, that their claim to copyright was valid, plaintiffs could not possibly have hoped to prevail against the

named defendants, in view of the fact that the defendants were acting in a prosecutorial, legislative or quasi-judicial capacity which afforded them immunity. Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.CT. 783 (1951); Lake Country Estates Inc. v. Tahoe Planning Agency, 440 U.S. 391. See also Owen v. City of Independence, 445 U.S. 622 (April 16, 1980). Under the trial facts, such use was "fair use" as a matter of law.

In enacting the Copyright Act, it must be assumed that Congress did not limit the privileges of legislators to be free from civil process for acts done in the furtherance of the exercise of their legislative duties. This is a right founded in the common law. Compare the Speech and Debate Clause found in the Federal Constitution, Art. I, sec. 6, cl. 2. See 23 L.Ed. 915 (Annotation) which discusses

immunity found under the federal speech and debate clause.

Defendants contend that the chronology of the above stated historical facts supports the conclusion of the trial court and provides circumstantial proof of the obvious; that is, that the lawsuit against the City Councilmen as individuals was filed with a motivation to vex and harass and for the extortive value attending the publicity surrounding its filing.

Further, the Plaintiffs' subsequent motion to dismiss the lawsuit filed on the Friday preceeding the date originally set for trial of the matter is further circumstantial proof that the real motivation in filing the lawsuit was the value of the original service of judicial process against the four city councilmen as individuals in this civil lawsuit, as a vehicle to vex and harass those defendants.

(B)(2) THE PLAINTIFFS' CLAIM IS SO LACKING IN MERIT AS TO PRESENT NO ARGUABLE QUESTION OF LAW OR GENUINE ISSUE OF FACT.

The unreasonableness of the Plaintiffs' claim that the subject matter in Appendix D-1 thru D-185, held to be obscene under Federal Standards, was copyrightable is a major factor to be weighed in considering the defendants' application for an award of costs to include its reasonable expenditures for attorney's fees.

At the time of filing of the within infringement action on October 12, 1976, U.S. District Judge Hill in Dallas, Texas had already filed his memorandum opinion, dated September 2, 1976, in Mitchell Brothers Film Group vs. Cinema Adult Theater et al., Civil Action CA-3-74-645-D, holding one of the films, "Behind the Green Door", to be uncopyrightable, because it was obscene as a matter of law. (See Appendix

D-2 through D-27). The law expressed in Judge Hill's opinion collected the prevailing authorities and reiterated the generally accepted rule of law that obscene matter was not copyrightable.

In his testimony, defendant James Clancy, who was called by the plaintiffs as an adverse witness, stated that the copyright application filed on behalf of the film "Behind the Green Door" was the first case in his knowledge in which a copyright claim had been filed on behalf of a sexually explicit film of that nature (hard-core pornography). That testimony was not controverted. One of the plaintiffs' witnesses claimed that, as a professor of law, he believed that obscene material should be a proper subject for copyright, but he could not point to any District or Appellate Court cases which supported his view and he dismissed the significance of

the 1957 opinion of the U.S. Attorney General which held to the contrary.

As with patent, copyright validity requires reference to the standard written into the Constitution: that is, the material must "promote the Progress of Science and Useful arts." Congress is without power to authorize the issuance of copyrights which are in derogation of this constitutional standard.

Implicit in the history of Constitutional law is the principle that obscenity, by definition, cannot promote the progress of science and useful arts, because it has been found to be inherently without social value. See Miller v. California, 413 U.S. 15. It is ludicrous to urge that under the copyright powers the federal authority has the power to grant a property interest (monopoly) in obscene material, which must be recognized by the Courts of every state in the Union. See, also, Point I, supra,

and the Petition for a Writ of Certiorari in Clancy, et al. v. Jartech, et al., concurrently being filed in C.A. # 79-3087.

(B)(3) THERE IS NO EXISTING "COPYRIGHT" CASE LAW WHICH CAN BE SAID TO BE CONTROLLING AS TO THESE TRIAL FACTS.

The record herein, where the subject matter has been held to be obscene under federal standards, and where the Defendants' copying was not for commercial reasons and was performed under the compulsion of a governmental duty to abate public nuisances is quite unlike the usual copyright infringement lawsuit which is governed by the above stated rules of law. Nor can it even be said that the recent decision of the Fifth Circuit in Mitchell Brothers Group, et al. v. Cinema Adult Theater, 604 F.2d 852 (Oct. 16, 1979) involving a "film piracy" battle between two pornographers is apposite. Petitioners contend that Judge

Waters correctly ruled on December 17, 1979, that the Fifth Circuit decision in Mitchell Brother Films Group v. Cinema Adult Theater, 604 F.2d 852 was not "pertinent" to the attorney's fees issue which was before him in that there were other factors which justified the decision he was making (see Appellant's Opening Brief at page 7). In this case, the Court found as a fact from the chronology of events, that the plaintiffs brought the lawsuit to "intimidate" the Council in the performance of their official duties (CR 140 at para 17) and, further, that "it would be inequitable to place the entire burden of the costs of this litigation on the taxpayers of Santa Ana" (CR 140 at para 20). For the same reason, plaintiffs may not argue that they should not be required to pay the prevailing party's attorney's fees where "there are unsettled issues of law or fact". See Northcross, et al. v. Board of Education of

Memphis City Schools, 611 F.2d 624 at 635, where the Court held in relation to the awarding of attorney's fees under 42 U.S.C., Section 1988:

> "However, we reject the notion that mere uncertainty in the law is a 'special circumstance' justifying rejection of the statutory remedy (attorney's fees)."

Petitioners submit that the rule of law which is most apposite in this "one of kind" case is the general equity "bad faith" exception, authoritatively expressed in Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. at page 258-259. "(A) court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . '." See also, Rich Co., Inc. v. United States for the U.S. of Industrial Lumber Co., Inc., 417 U.S. 116.

(B)(4) THE TRIAL FACTS ESTABLISH A CAUSE IN WHICH THE PREVAILING PARTY SHOULD BE COMPENSATED IN FULL AND THE LOSING PARTY SHOULD BE PENALIZED.

In his opinion, Judge Waters noted that: "It does not seem fair or equitable that the taxpayers of Santa Ana bear the entire burden of the cost of this litigation", (C.R. 119 at page 5), and found as a fact that "It would be inequitable to place the entire burden of the costs of this litigation on the taxpayers of Santa Ana", see Statement of Facts, supra, at page 28, (C.R. 140 at para 20). The substantial attorney's fees spent by the successful defendants in this case will, if not reimbursed from the losing plaintiffs, have the same effect on these defendants and on other potential individual defendants who are acting on behalf of government as would an award of substantial damages against them.

Were this Court to place a direct financial burden on individuals in City and County government (who are not copiers for profit and who are making good faith attempts to abate obscene films as public nuisances), these plaintiffs as producers of obscene motion picture films and other such producers would become the recipients of a defense which contravenes public policy in that the same would inflict a chilling effect on the legitimate use of the state courts for abatement of obscene films.

CONCLUSION

The judgment of the trial court below should be reinstated.

Dated May ____, 1982.

Respectfully submitted,

_____

James J. Clancy

Attorney for Petitioners

CERTIFICATE OF SERVICE

I, hereby certify that on this ____ day of May, 1982, the original and 40 copies of the within Petition for Writ of Certiorari were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109

_____
James J. Clancy
9055 La Tuna Cyn. Rd.
Sun Valley, CA 91352

Attorney for Petitioner.

APPENDIX A

Opinion of the United States Court of Appeals, Ninth Circuit, in Jartech, Inc., et al. v. Clancy, et al., 666 F.2d 403 (Jan. 25, 1982)

. . . . A-1 thru A-22

JARTECH, INC., Anatuna, Inc., Cinema 7, Inc., and Mooks, Inc., all California Corporations, Plaintiffs-Appellants,

v.

James J. CLANCY, Gordon Bricken, James E. Ward, David L. Brandt, David F. Ortiz, Defendants-Appellees.

JARTECH, INC.; Anatuna, Inc.; Cinema Seven, Inc.; and Mooks, Inc., all California Corporations, Plaintiffs-Appellants,

v.

James J. CLANCY; Gordon Bricken; James E. Ward; David L. Brandt; David F. Ortiz, Defendants-Appellees.

James J. CLANCY, Gordon Bricken, James E. Ward, David L. Brandt, David F. Ortiz, Counter-Claimants/Appellants,

v.

JARTECH, INC., Anatuna, Inc., Cinema 7, Inc., and Mooks, Inc., all California

Corporations, James Mitchell, Artie Mitchell, Mitchell Brothers Film Group, a general partnership, Counter-Defendants/Appellees. Nos. 79-3087, 80-5010 and 80-5016.

United States Court of Appeals, Ninth Circuit.

Jan. 25, 1982.

Appeal from the United States District Court for the Central District of California.

Before HUG and SKOPIL, Circuit Judges, and MUECKE, District Judge.

MUECKE, District Judge:

This series of appeals raises for the first time in this circuit the issue of whether obscenity is a defense to a copyright infringement claim. This court has also been asked to determine whether use of copies of a copyrighted work by a local government in a nuisance abatement action is within the fair use

exception to the copyright laws. Review is also sought of the trial court's award of attorney's fees upon the finding that the initiation of the suit was vexatious, and its dismissal of a counterclaim which sought a declaration that the copyrighted movies involved herein were obscene as a matter of law.

BACKGROUND

James and Artie Mitchell are the producers, distributors and displayers of adult movies. The plaintiffs below (hereinafter, "Mitchells"), are entities, controlled by the Mitchells, which perform these various functions. The defendants in the trial court were attorney James Clancy, and four individual members of the Santa Ana City Council (hereinafter collectively referred to as "the Council").

On January 19, 1976, Clancy entered into a contract with the City of Santa Ana to act as special counsel to the city for the drafting, adoption and implementation of a public nuisance abatement ordinance aimed at ridding the city of its adult movie theaters. Subsequently, the Council adopted a city ordinance which declared that certain cinematic depictions of sexual activities constituted a nuisance. Later, an amendment to the ordinance provided a procedure for the abatement of such nuisances. On October 26, 1976, the Council adopted a resolution declaring a Mitchell Brothers' theatre to be a nuisance for exhibiting such films. The City Attorney was ordered to abate the nuisance and all of the Mitchells' licenses and permits were revoked.

On October 12, 1976, the Mitchells

filed a suit against the Council for copyright infringement of five properly copyrighted motion pictures. The complaint alleged that an agent of the Council surreptitiously entered their theatre in Santa Ana and employed a process perfected by Clancy, whereby photographs were taken every few seconds of the visual screen images while a tape recorder recorded the entire soundtrack of the films. The photographs were subsequently reproduced in small prints of fifty per page, with the dialogue from the tape recordings printed underneath. These materials were used by the Council in determining that the theatre was a nuisance and in the subsequent abatement proceedings against the Mitchell theatre.

The Mitchells' copyright infringement suit proceeded to trial and on December 14, 1978, the jury returned special

verdicts which found that: "(1) each defendant was responsible for the copying of five movies to which the plaintiffs held a copyright; (2) the use made by the defendants of the copy of the films was a fair use; (3) each film was obscene; and, (4) The profits realized by the defendants as a result of the infringement of the copyright for each film was 'none.'"

On June 29, 1979, the trial court considered a counterclaim filed by the Council, which sought a declaratory judgment that the five pictures were obscene as a matter of law and should be seized as contraband. The court found that the action had been rendered moot by the determination made in the case-in-chief and that there no longer existed a case or controversy between the parties. Upon these findings, the

court concluded that it lacked jurisdiction to render a declaratory judgment on the issue of the obscenity vel non of the films, that it lacked the jurisdiction to authorize the forfeiture of materials found to be outside the copyright laws, and that federal copyright law made no specific provision for the exclusion of "immoral articles" or "obscene matter" from its protection.

On October 31, 1979, the trial court entered judgment for the Council and against the Mitchells for $23,157.11 in attorney's fees. This judgment was based upon the conclusion that the copyright infringement suit brought by the Mitchells was vexatious and brought to harass the defendants. The court noted that essentially the same plaintiffs had unsuccessfully tried the issue in the United States District Court in Texas.

The court felt that the timing of the suit suggested that it may have been instituted to intimidate the Council members in their consideration of the nuisance action pending against the plaintiffs. The court also questioned the plaintiffs' intent in bringing the suit against some, but not all, of the Council members in their individual capacities and in naming special counsel Clancy as a defendant, but not including the actual agent who made the film and sound reproductions.

From these actions, the Mitchells have appealed the special verdicts returned by the jury, finding that obscenity is a defense to a copyright infringement action and that the Council's use was a fair use. They have also appealed the award of attorney's fees. The Council has appealed the court's dismissal of its counterclaim.

THE COPYRIGHTABILITY OF OBSCENITY

Throughout pretrial proceedings and at trial, the Mitchells unsuccessfully asserted that obscenity was not a valid defense to a claim of infringement.

The Constitution authorizes the granting of copyrights "(t)o promote the Progress of Science and useful Arts," U.S. Const. art. 1, § 8, cl. 8. In response, Congress has authorized the copyrighting of "original works of authorship." 17 U.S.C. § 102 (1976). The Council argues that Congress may not grant copyright protection to obscenity as that would defy the constitutional mandate of promoting the progress of science and useful arts. The Mitchells assert that Congress has reasonably sought to effectuate the constitutional directive by enacting a content-free statute.

This Court, in considering the copyrightability of fraudulent materials in Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973), stated:

> "There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work. The gravity and immensity of the problems, theological, philosophical, economic and scientific that would confront a court if this view were adopted are staggering to contemplate. It is surely not a task lightly to be assumed, and we decline the invitation to assume it. 486 F.2d at 1088."

The Belcher decision was relied upon by the Fifth Circuit in rejecting obscenity as a defense to copyright

infringement in a case which also involved the Mitchells. Mitchell Brothers Film Group v. Cinema Adult Theatre, 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1277, 63 L.Ed.2d 601 (1980). That opinion traced the history of copyright laws, and in it the Fifth Circuit observed that any time a content-based statute had been passed by Congress, it has shortly thereafter been replaced with a content-free law.

The leading treatise on copyright has called the Fifth Circuit's Mitchell Brothers case "the most thoughtful and comprehensive analysis of the issue." Nimmer on Copyright, § 2.17, p. 2-194.2 (1980). Nimmer also considers Mitchell Brothers to represent the prevailing view on this issue. Id. While the case dealt with the now repealed Copyright Act of 1909, specifically 17 U.S.C.

§ 4, the language of the present statute requires the same interpretation. Prior law referred to "all writings of an author," while the current statute employs the similar phrase "original works of authorship." 17 U.S.C. § 102 (1976).

Pragmation further compels a rejection of an obscenity defense. Under the dictates of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), obscenity is a community standard which may vary to the extent that controls thereof may be dropped by a state altogether. Paris Adult Theatres I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628 37 L.Ed.2d 446 (1973); United States v. 2,200 Paper Back Books, 565 F.2d 566, 569-70 (9th Cir. 1977). Acceptance of an obscenity defense would fragment copyright enforcement, protecting registered materials in a certain community, while, in effect, authorizing pirating in

another locale.

FAIR USE

In returning one of its special verdicts, the jury found that the use made by the Council of the copies of the films was a "fair use." Fair use is a statutory defense to copyright liability. 17 U.S.C. § 107.

In its presentation to the jury, the Council had argued that because it had not commercially exploited the Mitchells' copyright, but had used it in a nuisance abatement proceeding, its use was within the safe harbor of fair use. The Mitchells have challenged the jury's determination of fair use and the trial court's instruction on the defense.

Recently, this Court closely scrutinized the fair use doctrine. Universal City Studios, Inc. v. Sony Corp.

of America, 659 F.2d 963, at 972-974 (9th Cir. 1981). Therein, it was determined, inter alia, that the copying of telecasts of copyrighted audiovisual materials by owners of video recorders in their homes for their own private noncommercial use was an infringement of the copyright laws. Specifically, the Sony Court found that such copying was not a fair use.

In coming to this conclusion, the Court first examined whether the alleged infringers reproduced the work for its intrinsic purpose. In other words, did the alleged infringers copy the material to use it for the same purpose that the copyright holder intended his audience to use or enjoy the work.

The Sony opinion then examined 17 U.S.C. § 107, which illustratively sets forth the parameters of fair use. Section 107 directs the consideration of: (1)

the purpose and character of the use, including whether such use is commercial or nonprofit; (2) the nature of the copyrighted work; (3) the amount of copying involved; and, (4) the effect of the copying on the market of the copyrighted work. Id.

In Sony, this Court found that the use made by the alleged infringers was the same intrinsic use to which the copyright holders expected protection from unauthorized use. Such a finding is strong indicia of finding no fair use. As this conclusion was not contradicted by the statutory analysis, the Court found no fair use and an infringement of the law.

In this case, the use to which the alleged infringers put the copy is not an intrinsic use. The alleged infringers made abbreviated copies of the films,

not for subsequent use and enjoyment, but for evidence to be used in the nuisance abatement proceedings. The suggestion of fair use made by the finding that the copies were not made for intrinsic use is not contradicted by application of Section 107's criteria. While the statutory standards are not precisely applicable to the facts at bar, because there was evidence that the Council's use was neither commercially exploitive of the copyright, nor commercially exploitive of the copyright holder's market, the jury's verdict is certainly supported by substantial evidence.

The district court instructed the jury on fair use, essentially in terms of the Section 107 criteria. The propriety of giving the fair use instruction may have been a closer question were it not for the fact that the record

reveals that the Mitchells proferred or at least acquiesced in the giving of the fair use instruction. Having failed to object to the giving of the instruction, the Mitchells may not now challenge the instruction as erroneous. Rule 51, F.R. Civ. P.

ATTORNEY'S FEES

Section 505 of the Copyright Act and its predecessor which was in effect at the time of this suit, Section 116, authorize the award of attorney's fees to the prevailing party in a lawsuit. 17 U.S.C. § 505 (1976); 17 U.S.C. § 116 (repealed). When attorney's fees are awarded to a prevailing defendant, the award represents a penalty for the institution of a frivolous or bad faith suit. Edward B. Marks Music Corp. v. Continental Record Co., 222 F.2d 488, 493 (2d Cir. 1955) cert. denied, 350 U.S.

861, 76 S.Ct. 101, 100 L.Ed. 764 (1955); Overman v. Loesser, 205 F.2d 521, 524 and n. 9 (9th Cir. 1953).

The court based its award of fees to the defendants on the grounds that the same issue had been decided against the plaintiffs in a recent district court case in Texas, and that the chronology of events led the court to believe that the suit was instituted for purposes of intimidation.

The Texas district court decision has since been reversed by the Fifth Circuit. Mitchell Brothers Film Group v. Cinema Adult Theatre, 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1277, 63 L.Ed.2d 601 (1980). While the district court decision will not be reversed in this case, the Mitchells' prosecution of obscenity as a defense was not only not frivolous, but their position has ultimately been

accepted. Furthermore, the Mitchells have offered explanations for their prosecution of this suit, which, in the opinion of this court, reflect a sincere interest in the settlement of close legal questions. The plaintiffs initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal.

In light of the foregoing, the trial court's award of attorney's fees is reversed.

PER SE OBSCENITY

The Council has appealed the dismissal of their counterclaim. The counterclaim sought a determination that the movies in question were "obscene per se" and urged the court to order the seizure and destruction of all prints of the films.

The court, with a verdict that obscenity constituted a defense to copyright infringement, determined that there was no longer a controversy between the parties and dismissed the counterclaim as being moot. The court made the alternate conclusions that the complaint failed to state a claim upon which relief could be granted and that the court was without the jurisdiction to order seizure and destruction of such materials.

While the decision below, that obscenity is a valid defense is incorrect, the Council's activities have been immunized by the jury's finding that their's was a fair use. As a consequence, the obscenity per se issue is still moot.

Additionally, the trial court's handling of the merits was entirely correct. There is nothing in the Copyright

Act to suggest that the Court has the authority to order forfeiture and destruction of obscene materials. See 17 U.S.C. §§ 501-10, Copyright Infringement and Remedies. Furthermore, the Council's request that the movies be found obscene as a matter of law flies in the face of settled Supreme Court case law which unquestionably establishes this as a factual determination. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L. Ed.2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973).

CONCLUSION

The decision of the trial court, finding the Council not liable for a copyright infringement, is affirmed. While this court does not agree that obscenity constitutes a defense to a copyright claim, the jury's verdict that

the use of the copyrighted materials was a fair use was not clearly erroneous.

The dismissal of the Council's counterclaim was also appropriate and is affirmed. The award of attorney's fees to the Council is reversed.

AFFIRMED in part; REVERSED in part.

APPENDIX B

Decision and Order for Findings of Fact, Conclusions of Law and Judgment re Motion for Costs Taxable By the Court and Attorney's Fees in Jartech, Inc., et al. v. Clancy, et al., CV 76-3191-LEW

. . . . B-1 thru B-10

Findings of Fact and Conclusions of Law Re Motion for Costs and Attorney's Fees, filed Oct. 31, 1979 in Jartech, Inc., et al. v. Clancy, et al., CV 76-3191-LEW

. . . . B-11 thru B-22

Judgment for Costs Including Attorney's Fees on Claim, Entered on Nov. 5, 1979

. . . . B-23 thru B-25

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations, Plaintiffs, v. JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ, Defendants.	FILED MAR 22 1979 CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA BY DEPUTY Civil No. 76-3191-LEW
JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ, Counter-claimants, v. JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations, JAMES MITCHELL, ARTIE MITCHELL, MITCHELL BROTHERS' FILM GROUP, a general partnership, Counter-defendants.	DECISION AND ORDER FOR FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT RE MOTION FOR COSTS TAXABLE BY THE COURT AND ATTORNEYS' FEES.

These motions having come on regularly for hearing and the court having considered the pleadings and the arguments of counsel and being fully advised in the premises, it is the decision of the court that the defendants are entitled to an award of attorneys' fees and certain costs.

Plaintiffs brought this cause on after defendants, as members of the City Council of Santa Ana, hired defendant Clancy as special counsel to conduct an investigation solely in connection with the drafting, consideration and adoption of an ordinance in a public nuisance abatement matter. (Santa Ana Ordinance No. NS-1325, Resolution 76-134) There was no commercial or other exploitative use made of certain time-motion photos and sound track recordings taken of the subject motion pictures. The investigative actions taken fall within the ambit

of the Fair Use doctrine despite the fact that the copying and recording were extensive.

Defendants' motion for attorneys' fees and costs is premised on the following propositions:

1) Defendants are the prevailing parties;

2) Section 116 of the Copyright Statute (17 USC §116) authorizes the discretionary award of attorneys' fees to defendants when the real purpose of the suit was to "vex or harass" the opposing party rather than to fairly resolve the legal question presented.

Plaintiffs, of course, asserted a tenable legal proposition in their complaint:

1) The subject motion pictures had received a Certificate of Registration from the United States Copyright Office; and

2) The mere taking of the pictures and the recording of the sound tracks constituted per se infringements of these copyrights.

Whether this action was a good faith effort by the plaintiffs to protect against copyright infringement or whether they had some other purpose is open to some question. Plaintiffs knew that the filing of this case would inevitably raise the issue of the copyrightability of obscenity. The same issue (although in a different context) had been tried recently in the United States District Court for the Northern District of Texas (Mitchell Bros. Film Group, et al. v. Cinema Adult Theater, et al., Civil No. CA-3-74-645-D) and had been resolved adversely to the plaintiffs herein who were essentially the same real parties in interest in the Texas action. During

the proceedings in the instant case, counsel for plaintiffs urged this court to delay this action pending a decision by the 5th Circuit Court of Appeals to which the Texas action had progressed.

It is to be noted that the named defendants in the present action include some, but not all, of the members of the City Council of Santa Ana and also include the special counsel hired by the City of Santa Ana for the purpose of drafting an ordinance for the abatement of a public nuisance. These defendants were named individually and not in their elected, or professional capacities. The City of Santa Ana was not named as a defendant nor was Robert McGuire, the individual who actually took the time-motion studies and made the recordings in his role as agent for defendant Clancy. When queried, counsel for plaintiffs

gave no cogent reason why the defendants were named individually and why the City of Santa Ana was not named at all.

The chronology of events leading up to the filing of this action is enlightening. On January 19, 1976, the City Council of Santa Ana duly enacted Santa Ana Municipal Ordinance NS-1287; and on October 4, 1976, it amended the same ordinance by NS-1325, providing a procedure for the abatement of public nuisances. Section 12-105 of NS-1325 requires the City Attorney, upon a finding by resolution of the City Council that a public nuisance exists, to take action to abate said public nuisance.

Acting on the information provided to the City Council by the time-motion studies prepared by defendant Clancy and McGuire, the City Council of the

City of Santa Ana adopted, on October 26, 1976, Resolution No. 76-134, entitled, "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE MITCHELL BROTERS' SANTA ANA THEATER, LOCATED AT 1565 WEST 17TH STREET, SANTA ANA, CALIFORNIA, IS IN VIOLATION OF ORDINANCE NS-1325 OF THE CITY OF SANTA ANA; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE, REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO COMPLY WITH SECTION 12-105 OF THE SANTA ANA MUNICIPAL CODE."

On October 12, 1976, and thus prior to the time of the adoption of Resolution NS 76-134, the complaint was filed in the present action.

In view of the selective designation of the named defendants, the chronology

involved in the consideration and passage of Ordinance NS-135, Resolution 76-134, the date of the filing of the action, and the anticipation of subsequent action to be taken by the City of Santa Ana against the Mitchell Bros. Theater, the inference is strong that plaintiffs were merely using this lawsuit as a "fighting ship" for the purpose of intimidating the members of the Council in the performance of their official duties insofar as they might affect the plaintiffs and their related interests.

Similarly, no persuasive reason was advanced for the naming of the City of Santa Ana's special counsel as an individual defendant. The inference is equally clear that this was done for the purpose of inhibiting any professional action that Mr. Clancy might

take or be permitted to take in the future in connection with this matter. Plaintiffs were successful in the latter objective since the City of Santa Ana was compelled to associate new counsel for the trial of this action.

In light of the foregoing, it does not seem fair or equitable that the taxpayers of Santa Ana bear the entire burden of the cost of this litigation.

IT IS, THEREFORE, ORDERED that defendants are entitled to costs as prayed for, deleting therefrom items 6, 7, and 8 for a resulting total in the amount of $3,391.26, attorneys' fees in the amount of $10,417.24 for the services of James J. Clancy, Esq., and the sum of $7,000.00 plus expenses in the amount of $1,399.99 for Larry Parrish, Esq.

Counsel for defendants is directed to prepare findings of fact, conclusions

of law and judgment pursuant to Local Rule 7. (Judgment should be set forth as a separate document as required by Rule 58, F.R.Civ.P.).

DATED: This 20th day of March, 1979.

/s/ LAUGHLIN E. WATERS

Laughlin E. Waters
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations, Plaintiffs, v. JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ, Defendants.	CV 76-3191-LEW FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTION FOR COSTS AND ATTORNEYS' FEES.
JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ, Counter-claimants, v. JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations, JAMES MITCHELL, MITCHELL BROTHERS' FILM GROUP, a general partnership, Counter-defendants.	FILED OCT 31 1979 CLERK U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA BY _____ DEPUTY

The motion for recovery of costs, including an award of attorneys' fees, came on regularly for hearing February 5, 1979, and the Court having considered the pleadings and arguments of counsel, the matter having been submitted to the Court for decision and the decision having been rendered for the defendants, the Court makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. This Court has exclusive jurisdiction to determine the copyright issues involved in this case, including the issue of attorneys' fees, under 28 U.S.C. §1338 and 17 U.S.C. §116 (now 17 U.S.C. §505).

2. Plaintiffs brought this action for alleged infringement of their copyrights in the following motion pictures:

(a) Jartech, Inc., "Behind the

Green Door",

(b) Anatuna, Inc., "Resurrection of Eve",

(c) Cinema 7, Inc., "Sodom and Gomorrah - The Last Seven Days," and "Inside Marilyn Chambers",

(d) Mooks, Inc., "The Autobiography of a Flea";

arising out of certain photos and sound track recordings taken the motion pictures which were being shown at the Mitchell Brothers' Santa Ana Theater in Santa Ana, County of Orange, State of California.

3. Defendant, James J. Clancy, was hired by the Santa Ana City Council as special counsel to conduct an investigation solely in connection with the drafting, consideration and adoption of a public nuisance abatement ordinance. (Santa Ana Ordinance No. NS 1325, Resolution 76-134)

4. In connection with the

investigation, an off-duty Los Angeles police officer, Robert McGuire, acting as agent for defendant James J. Clancy and the City Council of Santa Ana, performed services for hire by taking time-motion photographs and making sound recordings of the above-described pictures as they were exhibited at the Mitchell Brothers' Santa Ana Theater.

5. At all times complained of, defendants Gordon Bricken, James E. Ward, David L. Brandt and David F. Ortiz were members of a seven member City Council of Santa Ana, County of Orange, State of California, which hired defendant James J. Clancy.

6. A jury was impaneled at the plaintiffs' request and after trial of the issues rendered its special verdicts that (1) each of the motion pictures listed above is obscene, (2) each

defendant was intentionally responsible for the copying of each motion picture, (3) none of the defendants realized any profit from the copying, (4) the use made by the defendants of the copies was a fair use, and (5) the individual defendants did not infringe the copyrights of the above-described motion pictures.

7. In causing copies of the motion pictures to be made, the defendants acted only in their official capacities.

8. The motion pictures listed above were copies extensively for the use of the City Attorney and City Council in determining whether to bring nuisance abatement suits to stop exhibition of the pictures and operation of the Santa Ana Theater.

9. No commercial use was made of the time-motion photos and sound track recordings which were taken and made of

the listed motion pictures.

10. Plaintiffs filed this suit only after defendant City Council members had hired the defendant Clancy to conduct an investigation in connection with the drafting and consideration of a public nuisance abatement ordinance.

11. The City of Santa Ana amended Ordinance NS-1287 on October 4, 1976, to provide a procedure for the abatement of public nuisances, requiring the City Attorney to take action to abate a public nuisance upon a finding by resolution of the City Council that a public nuisance exists. Ordinance NS-1325.

12. The plaintiffs filed this lawsuit on October 12, 1976.

13. The City of Santa Ana adopted a resolution declaring the Santa Ana Theater to be a public nuisance on October 26, 1979.

14. The four members of the City Council who were named as defendants were sued in their individual capacities; three other members were not named as defendants.

15. The City of Santa Ana was not named as a defendant.

16. Robert McGuire, who performed his service for hire and actually took the time-motion studies and made the recordings, was not named as a defendant.

17. The chronology of events leading to the Santa Ana resolution declaring the Santa Ana Theater to be a public nuisance, and to the filing of this action, as well as the plaintiffs' careful choice of defendants, leads to the conclusion that the plaintiffs filed this lawsuit in anticipation of subsequent action to be taken by the City of Santa Ana in order to intimidate the members of the Council in the performance of their official

duties insofar as plaintiffs' interests in these motion pictures and the Santa Ana Theater might be concerned.

18. When they filed this lawsuit, the plaintiffs knew that the copyrightability of obscenity would be an issue, that this issue had been decided against the same real parties in interest in a recent district court case in Texas (Mitchell Bros. Film Group, et al. v. Cinema Adult Theater, et al., Civil No. CA-3-74-645-D), and that an appeal from this decision was pending in the Fifth Circuit. The plaintiffs proceeded to file this lawsuit and then urged this Court to stay this action pending the Fifth Circuit decision.

19. At the hearing on this matter, plaintiffs' counsel was able to advance no persuasive reason for the naming of Santa Ana's special counsel as an

individual defendant. The clear inference is that the plaintiffs intended to inhibit any professional action that Mr. Clancy might take in the future in connection with this matter. In fact, the City of Santa Ana was compelled to associate new counsel for the trial of this action.

20. It would be inequitable to place the entire burden of the costs of this litigation on the taxpayers of Santa Ana.

21. On January 19, 1976, the City of Santa Ana, acting through its City Council, entered into an "Agreement for Legal Services" with the defendant James J. Clancy to defend the City in any litigation arising out of Ordinance No. NS-1287. Said contract called for the payment of $50.00 per hour of attorney services, plus incidental out-of-pocket expenses. On October 22, 1976, the City instructed the defendant James J. Clancy

to undertake the defense of the four City Councilmen who were named individually as defendants, pursuant to the terms and conditions of said agreement.

22. The hourly rate of $50.00 plus reimbursement for out-of-pocket office expenses is a reasonable amount based on rates charged by attorneys of comparable skill in the area.

23. In support of their fee application, the defendants have filed affidavits setting forth an itemized account of the time spent by the attorneys James J. Clancy and Larry Parrish in defending against the complaint. Based upon the accounts submitted and after consideration of the objections to the application and the comments in its support, the Court finds that $10,417.24 is a reasonable fee for the services of James J. Clancy in defense against the complaint, that

$3391.26 is reasonable reimbursement for out-of-pocket costs and expenses, that $7000 is a reasonable fee for the services of Larry Parrish in defense against the complaint and that $1399.99 is a reasonable reimbursement for his out-of-pocket costs and expenses.

CONCLUSIONS OF LAW

1. The defendants are the prevailing parties.

2. The plaintiffs filed this lawsuit in order to vex and harass the defendants. It was not a good faith effort fairly to resolve the legal questions presented. Consequently, an award of attorneys' fees to the prevailing party is appropriate.

3. The plaintiff corporations are controlled by James Mitchell and Artie Mitchell, who are individually liable for the liabilities of the corporations.

4. Full costs in an amount previously determined by the Clerk of this Court plus a reasonable attorneys' fee in the amount of $23,157.11 is recoverable from the plaintiffs.

DATED: October 30, 1979

/s/ LAUGHLIN E. WATERS

Laughlin E. Waters

United States District Judge

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California 91352
In Pro Per, Defendant.

DAVID A. DEPEW
241 S. Electric Avenue
Alhambra, California 91801
Tel: (213) 282-5711
Attorney for Defendants, Gordon Bricken, James E. Ward, David L. Brandt, and David F. Ortiz.

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DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations,

Plaintiffs,

vs.

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ,

Defendants.

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, DAVID F. ORTIZ,

Counter-claimants,

vs.

FILED
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CLERK,
U.S.
DISTRICT
COURT
CENTRAL
DISTRICT
OF
CALI-
FORNIA
BY
_____
DEPUTY

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., AND MOOKS, INC., all California Corporations, JAMES MITCHELL, ARTIE MITCHELL, MITCHELL BROTHERS' FILM GROUP, a general partnership. Counter-Defendants.	Civil Action No. 76-3191-LEW JUDGMENT FOR COSTS INCLUDING ATTORNEY'S FEES ON CLAIM. (PROPOSED)

These motions regarding costs including attorneys' fees on the claim of having come on regularly for hearing February 5, 1979 before Honorable Laughlin E. Waters, District Judge, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged: that the defendants James J. Clancy, Gordon Bricken, James E. Ward, David L. Brandt, and David F. Ortiz recover of the plaintiffs JARTECH, INC., a California corporation, ANATUNA, INC., a California corporation, CINEMA 7, INC., a California

corporation, and MOOKS, INC., a California corporation, and their alter ego, James Mitchell and Artie Mitchell, jointly and severally the sum of TWENTY-THREE THOUSAND ONE-HUNDRED FIFTY-SEVEN DOLLARS and ELEVEN CENTS ($23,157.11), with interest thereon at the rate of seven per cent per annum as provided by law, as costs of action.

Dated at Los Angeles, California, this 6 day of Oct, 1979.

/s/ LAUGHLIN E. WATERS
U.S. DISTRICT JUDGE

EXHIBIT C

(Reference: Petition at pgs. 12, 13, 15, 16, 17, 18, 24, 26, 27

Santa Ana Ordinance N.S. 1287, enacted Jan. 19, 1976, entitled "An Ordinance of the City of Santa Ana Adding Sections 12-100 through 12-105 to the Santa Ana Municipal Code Declaring the Commerical Exploitation of Patently Offensive Sexual Conduct in Lewd Films and Theatres Exhibiting The Same To Be A Public Nuisance and Ordering Their Abatement:

. . . . C-1 thru C-24

Santa Ana City Council Resolution 76-134, passed and adopted October 26, 1976, entitled: "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE MITCHELL BROTHERS' SANTA ANA THEATER, LOCATED AT 1565 WEST 17th STREET, SANTA ANA, CALIFORNIA, IS IN VIOLATION OF ORDINANCE NS 1325 OF THE CITY OF SANTA ANA; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE, REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL NECESSARY TO COMPLY WITH SECTION 12-105 OF THE SANTA ANA MUNICIPAL CODE.

. . . . C-25 thru C-44

ORDINANCE NO. NS-1287

AN ORDINANCE OF THE CITY OF SANTA ANA ADDING SECTIONS 12-100 THROUGH 12-105 TO THE SANTA ANA MUNICIPAL CODE DECLARING THE COMMERCIAL EXPLOITATION OF PATENTLY OFFENSIVE SEXUAL CONDUCT IN LEWD FILMS AND THEATRES EXHIBITING THE SAME TO BE A PUBLIC NUISNACE AND ORDERING THEIR ABATEMENT.

THE CITY COUNCIL OF THE CITY OF SANTA ANA DOES ORDAIN AS FOLLOWS:

SECTION 1: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-100, which said section reads as follows:

Sec. 12-100. Purpose and Effect.

The City Council finds that the

crass commercial exploitation of explicit sexual conduct through the public exhibition of lewd films constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; is indecent and offensive to the senses and interferes with the comfortable enjoyment of life and property, in that such interferes with the interest of the public in the quality of life and total community environment, the tone of commerce in the City, property values, and the public safety; and that the continued operation of such activities is detrimental to the best health, safety, convenience, good morals and general welfare of the City of Santa Ana, and of the residents, citizens, inhabitants and businesses thereof. Pursuant to §§ 38771, 38773 and

38773.5 of the Government Code, § 731 of the Code of Civil Procedure, and §§ 3479, 3480, 3491 and 3494 of the Civil Code, the City Council hereby declares such activities to be a public nuisance, and herein establishes procedures for the abatement thereof. This ordinance shall apply to existing establishments which are presently engaged in the type of activity herein declared to be a public nuisance.

SECTION 2: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-101, which said section reads as follows:

Sec. 12-101. Definitions.

(A) "Lewd Film" means any motion picture film:

(1) which the average person, applying contemporary community standards, would find, when considered

as a whole, appeals to the prurient interest; and

(2) which depicts or describes patently offensive representations or descriptions of:

(a) ultimate sexual acts, normal or perverted, actual or simulated; or

(b) masturbation, excretory functions, or lewd exhibition of the genitals or genital area.

Nothing herein contained is intended to include or proscribe any film which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(B) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or

the ground itself.

(C) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen.

(D) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(E) "Knowledge" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in such lewd film.

SECTION 3: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-102, which

said section reads as follows:

Sec. 12-102. Lewd Films and Theatres Exhibiting the Same Declared a Public Nuisance; Abatement Thereof.

(A) Any and every place in the City of Santa Ana where:

(1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or

(2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibitions, is a public nuisance.

(B) Any and every lewd film which is publicly exhibited or possessed for such purpose in the City of Santa Ana is a public nuisance per se.

(C) From and after service on the theatre, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, all moneys paid thereafter as admission price to such exhibitions are also declared to be a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

(D) Upon receiving notice through service of a certified copy of this ordinance and of a cerified copy of the Resolution and order of summary abatement provided for in Section 12-103 hereof, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana which is declared

to be a public nuisance as set forth and stated in Subsection (A) of this Section 12-102 is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable thereof.

(E) The places and subject matter declared to be public nuisances under Subsections (A) through (C) of this section shall be abated pursuant to Government Code §§ 38773 and 38773.5, Code of Civil Procedure § 731, and Civil Code §§ 3491 and 3494, as provided for herein.

SECTION 4: That the Santa Ana Municipal Code is hereby amended by adding a section, to be numbered 12-103, which said section reads as follows:

Sec. 12-103. Action to be Taken by City Council.

Upon a specific finding that

a public nuisance, as defined in Section 12-102 hereof, exists in the City of Santa Ana, the City Council, in applying the provisions of this ordinance to such nuisance, shall provide for the following by Resolution:

(A) Declare the fact that such nuisance exists.

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth the evidentiary facts considered by the City Council in arriving at its factual determination that a lewd film or films, as defined in Section 12-101(A) hereof, are publicly exhibited or possessed for exhibition at such real property and are public nuisances as declared herein, including a recitation of the particular sexual

conduct and acts which the City Council finds are patently offensive.

(D) Order all persons named in Section 12-102 (D) hereof to summarily abate such public nuisances immediately, by terminating the exhibitions of such lewd film or films, or causing the same to be terminated, and voluntarily surrendering possession of the same to the court having jurisdiction of the legal proceedings brought by the City Attorney, pursuant to Sections 12-103 (E) and 12-105 of this ordinance, and notifying the City Clerk and City Council of compliance therewith by sworn affidavit, as authorized by Government Code § 38773, and as ordered by the action of the City Council in such resolution.

(E) Order the City Attorney to proceed as directed in Section 12-105 hereof and do all the things directed

therein and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law, including requesting the court to advance such proceedings on the calendar of the court.

(F) Inform and give notice to persons named in Section 12-102(D) that:

(1) The City Council has determined that a public nuisance presently exists at such place and address, and that, under Section 12-102 (D) hereof, they are deemed to have knowledge thereof and are responsible therefor.

(2) The City Council has ordered the City Attorney, as provided for under Section 12-105 hereof, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially under Civil

Code § 3494 and Code of Civil Procedure § 731, as a supplemental remedy to the summary abatement process, authorized by Government Code § 38773 and ordered by the City Council in Section 12-103 hereof and that under subsections (A) and (B) of Sec. 12-104, the costs of abatement of such civil abatement action filed under Civil Code § 3494 and Code of Civil Procedure §731, including investigative costs, court costs, attorney's fees, and other expenses, are made a special assessment against the parcel of land upon which such nuisance is being maintained and, upon their determination in such court action, will, by separate ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner.

(3) All films being used in conducting and maintaining such public

nuisance are contraband and the subject of forfeiture.

(4) From and after service on the theatre or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such Resolution any and all moneys paid as admission price to such exhibitions are a public nuisance as personal property used in conducting and maintaining such nuisance and, as such, are the subject of forfeiture.

(G) Order that a certified copy of said Resolution and a certified copy of this ordinance be delivered in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure §§ 415.10 through 416.90, to all persons of record having any legal or equitable interest

in the real property, and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

SECTION 5: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-104, which said section reads as follows:

Sec. 12-104. Action brought Pursuant to Civil Code §§3494, et al.; Forfeiture to the General Fund of the City, Cost of Abatement; Manner of Collection.

(A) Upon judgment against the operators of the theatre in legal proceedings brought pursuant to Civil Code §§ 3491 and 3494, and Code of Civil

Procedure §731, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a public nuisance under Section 12-102 (C) of this ordinance. Such moneys or their equivalent shall be forfeited to the general fund of the City of Santa Ana.

(B) The cost of abatement shall include the following:

(1) investigative costs.

(2) court costs.

(3) reasonable attorney's fees arising out of the preparation for, and trial of the cause, and appeals therefrom.

(4) printing costs of trial and appellate briefs, and all other papers filed in such proceedings.

Such cost of abatement is hereby made a special assessment

against the parcel of land upon which such nuisance is maintained. Upon its determination in a civil action under Civil Code §3494 and Code of Civil Procedure § 731, such shall, by special ordinance, be made a lien against such property and a personal obligation against the theatre operator and property owner and shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure and sale in the case of delinquency as provided for ordinary municipal taxes. All laws, applicable to the levy, collection and enforcement of municipal taxes, shall be applicable to such special assessment.

SECTION 6: That the Santa Ana Municipal Code, is hereby amended by adding a section, to be numbered 12-105,

which said section reads as follows:

Sec. 12-105. Action to be Taken by City Attorney.

Upon a specific finding by Resolution of the City Council of the fact that a public nuisance exists at a particular location, the City Attorney shall:

(A) Not later than ten days after passage of said resolution, commence legal proceedings under Civil Code §§ 3491 and 3494 and Code of Civil Procedure §731, by the filing of a civil action seeking the following relief:

(1) A Declaratory Judgment that the motion picture or pictures named by the City Council are lewd films.

(2) A Declaratory Judgment that the films found to be lewd are public nuisances under this ordinance and such Resolution.

(3) A Declaratory Judgment

that the place named by the City Council where the film or films are being exhibited is a public nuisance under this ordinance and such Resolution.

(4) An accounting of all moneys paid as admission price to the operators of the theatre from and after the time the persons maintining said nuisance receive notice of the finding by the City Council that the public nuisance exists, and a Declaratory Judgment that such moneys are a public nuisance under this ordinance.

(5) An Order that all admission price moneys derived from the showing of the named lewd film or films and enumerated in the Court ordered accounting be forfeited to the general fund of the City of Santa Ana as contraband.

(6) An injunction enjoining and restraining all persons guilty

of maintaining said nuisance from exhibiting in public the named lewd films at any time in the future in the City of Santa Ana.

(7) An Order that all positive prints of the named lewd films be forfeited as contraband under this ordinance.

(8) Judgment for the City of Santa Ana for all costs therein expended, including investigative costs, court costs, reasonable attorney's fees, and such other expenses as are provided for herein.

(9) All other relief as the Court may deem proper.

(B) File a notice of the pendency of the action in the office of the County Recorder of the County of Orange, pursuant to Code of Civil Procedure § 409, giving the names of the parties, the

object of the action, and a description of the property thereby affected.

SECTION 7: If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Santa Ana hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 8: Neither the adoption of this ordinance nor the repeal hereby of any ordinance shall in any manner

affect the prosecution for violation of ordinances, which violations were committed prior to the effective date hereof, nor be construed as affecting any of the provisions of such ordinance relating to the collection of any such license or penalty or the penal provisions applicable to any violation thereof, nor to affect the validity of any bond or case deposit in lieu thereof, required to be posted, filed or deposited pursuant to any ordinance and all rights and obligations thereunder appertaining shall continue in full force and effect.

SECTION 9: The Clerk of the Council shall certify to the passage and adoption of this ordinance and shall cause the same to be published in the official newspaper of the City of Santa Ana within fifteen (15) days after its adoption.

SECTION 10: This ordinance shall take effect upon posting or publication, whichever is earlier.

PASSED AND ADOPTED by the City Council of the City of Santa Ana at its regular meeting held on the 19th day of January, 1976.

ATTEST:

ORIGINAL SIGNED BY

JOHN GARTHE

MAYOR

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

CITY OF SANTA ANA)

I, FLORENCE I. MALONE, do hereby certify that I am the Clerk of the Council of the City of Santa Ana; that the foregoing Ordinance was introduced to said Council at its regular meeting held on the 5th day of January, 1976, and was again considered by said Council at its regular meeting held on the 19th day of January, 1976, and was at said meeting passed and adopted by the following vote, to wit:

AYES,	COUNCILMEN:	Yamamoto, Evans, Bricken, Ortiz, Garthe, Brandt, Ward
NOES,	COUNCILMEN:	None
ABSENT,	COUNCILMEN:	None

ORIGINAL SIGNED BY

FLORENCE I. MALONE

CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW, CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: October 20 1977

FLORENCE I. MALONE

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

RESOLUTION NO. 76-134

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DETERMINING THAT THE REAL PROPERTY AND ACTIVITY KNOWN AS THE MITCHELL BROTHERS' SANTA ANA THEATER, LOCATED AT 1565 WEST 17TH STREET, SANTA ANA, CALIFORNIA, IS IN VIOLATION OF ORDINANCE NS 1325 OF THE CITY OF SANTA ANA; DECLARING SUCH ACTIVITY TO BE A PUBLIC NUISANCE, REVOKING ALL LICENSES AND PERMITS, AND ORDERING ABATEMENT; AND ORDERING THE CITY ATTORNEY TO TAKE ALL STEPS NECESSARY TO COMPLY WITH SECTION 12-105 OF THE SANTA ANA MUNICIPAL CODE.

BE IT RESOLVED by the City

Council of the City of Santa Ana:

Section 1. Pursuant to Section 38771 of the Government Code which authorizes the City Legislative Body to declare by Ordinance what constitutes a nuisance, the City Council of Santa Ana did, on the 5th day of January, 1976, adopt Ordinance No. NS-1287 which became effective on the 18th day of February, 1976, and did supersede the same with Ordinance No. NS 1325, adopted as an urgency Ordinance on the 4th day of October, 1976, to become effective immediately upon adoption. Said Ordinance declares:

A. Any and every place in the City of Santa Ana where: (1) lewd films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or (2) a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such

exhibition, to be a public nuisance.

B. Any and every lewd film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under (A) above, to be a public nuisance per se.

C. From and after service on the place, or its manager, or acting manager, or person then in charge of such place, of a certified copy of Ordinance No.NS 1325, and a certified copy of the Resolution authorized by said Ordinance, all moneys paid thereafter as admission price to such exhibitions are also a public nuisance, as personal property used in conducting and maintaining a declared public nuisance.

D. Upon receiving notice through service of a certified copy of Ordinance NS.1325 and of a certified copy of the Resolution authorized by said

Ordinance, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Santa Ana where lewd films are publicly exhibited, or possessed for the purpose of such exhibition in the regular course of business, or where a single lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition, is deemed to be a person who has knowledge of such nuisance for purposes of said Ordinance and this Resolution and is, thereafter, responsible for its maintenance, and shall be liable therefor.

Section 2. Pursuant to the provisions of Ordinance NS.1325, the City Council of Santa Ana makes the following findings of fact concerning the identity of the motion picture films which have been and are being exhibited at the

"Mitchell Brothers' Santa Ana Theater":

A. Upon the instructions of the Santa Ana City Attorney, a continuous surveillance of the films being exhibited at the "Mitchell Brothers' Santa Ana Theater" has been maintained, which surveillance shows that, during the ten-month period from November 28, 1975 through September 1976, approximately 13 programs have been exhibited at said theater with each program containing one or more motion picture films. The titles of the films exhibited at each of the 13 programs and the approximate playing date of each is set forth in Enclosure A to this Resolution.

B. Photographic time-motion studies of the 26 motion picture films and previews exhibited at the "Mitchell Brothers' Santa Ana Theater" during the ten-month period from November 28, 1975

through September 1976, being programs 1 through 13 described in Enclosure A, have been prepared and have been filed with the City Council, and the members of the City Council have examined the photographic content in each of such time-motion studies.

Section 3. Pursuant to the provisions of Ordinance NS. 1325, and based upon the evidentiary facts referred to in Section 2 above, the City Council of Santa Ana makes the following findings of fact concerning the character and nature of the aforementioned motion picture films which have been, and are being, exhibited at the "Mitchell Brothers' Santa Ana Theater":

A. Each of the aforementioned 26 motion picture films and previews which have been exhibited at the "Mitchell Brothers' Santa Ana Theater" as a part of

programs 1 through 13, is a lewd film as defined in Section 12-101 of the Santa Ana Municipal Code, in that (1) the average person, applying contemporary community standards, would find that, when considered as a whole, said film appeals to the prurient interest, and (2) said film depicts and describes patently offensive representations and descriptions of ultimate sexual acts, and (3) said film possesses no serious literary, artistic, political, or scientific value. The patently offensive representations and descriptions which are referred to are depicted on the individual photographs of the above described time-motion studies which have been examined by the City Council, and such studies are incorporated herein by reference.

Section 4. All licenses and permits which have been issued as a

part of the operation of the "Mitchell Brothers' Santa Ana Theater" are hereby revoked, subject to confirmation by the Court, in judicial proceedings required herein. Criminal proceedings for transacting business without a license at the "Mitchell Brothers' Santa Ana Theater" shall not be filed until the order of license revocation by the City Council has been confirmed by judicial order.

Section 5. Pursuant to the provisions of Ordinance NS. 1325, and based upon evidentiary facts contained in the business records of the City of Santa Ana and other evidence on file with the City Council in matters pertaining to the "Mitchell Brothers' Santa Ana Theater", which are incorporated herein by reference as though set forth herein in full, the City Council of Santa Ana makes the following findings of fact with

respect to the place commonly known as the "Mitchell Brothers' Santa Ana Theater":

A. There is presently located in the City of Santa Ana a motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" doing business upon real property known as 1565 West 17th Street, Santa Ana, County of Orange, California, being:

> That portion of Lot 3 of the Mabury Tract, in the City of Santa Ana, County of Orange, State of California, as per map recorded in Book 165, Page 301 of Deeds, Records of Los Angeles County, California, described as follows:
>
> Beginning at a point North 0° 48' 00" East 367.72 feet from

the Southwest corner of that certain parcel of land described in Parcel 1 of the Deed recorded May 7, 1953 in Book 2499, Page 293 of Official Records, records of said Orange County, said point of beginning being on the Westerly line of above mentioned parcel of land; thence North 0° 48' 00" East 250.00 feet continuing along said Westerly line; thence North 89° 49' 00" East 90.00 feet, leaving said Westerly line; thence South 0° 48' 00" 250.00 feet; thence South 89° 49' 00" West 90.00 feet to the point of beginning.

B. The motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" located at 1565 West

17th Street, Santa Ana, California, is a public nuisance, being a place where lewd films are publicly exhibited, and possessed for the purpose of such exhibition, as a regular course of business.

C. United Artists Theatres, Inc., 172 Golden Gate Avenue, San Francisco, California 94102, is the Lessee of the real property commonly known as "Mitchell Brothers' Santa Ana Theater".

D. JOHN DOE 1 is the sublessee or assignee of the principle lease of the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

E. Allison Honer Co., a Partnership, P.O. Box 84, Santa Ana, California 92702, is the owner of the real property commonly known as "Mitchell Brothers' Santa Ana Theater", located at

1565 West 17th Street, Santa Ana, California.

F. Bank of America National Trust and Savings Association, a National Banking Association, is the owner of a security interest in such real property, as shown on the Trust Deed recorded on September 10, 1965 in Book 7660, Page 155, Official Records.

G. M.B.F.G. Theatre Circuit, Inc., is the holder of a business license issued by the City of Santa Ana, for the operation of the business conducted upon the real property commonly known as the "Mitchell Brothers' Santa Ana Theater", 1565 West 17th Street, Santa Ana, California.

H. JOHN DOE 2 is the operator, JOHN DOE 3 is the manager, and JOHN DOE 4 is the acting manager or person in charge of the establishment commonly known

as the "Mitchell Brothers' Santa Ana Theater", located at 1565 West 17th Street, Santa Ana, California.

Section 6. United Artists Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater" are:

A. hereby informed and given notice that (1) the City Council has determined that a public nuisance exists on the property located at 1565 West 17th Street, Santa Ana, California; namely, the "Mitchell Brothers' Santa Ana Theater"

and that, under Section 12-103 of the Santa Ana Municipal Code, they are responsible therefor upon receiving notice through service of a certified copy of the Ordinance and a certified copy of this Resolution, and (2) any and all licenses and permits heretofore issued for the premises known as 1565 West 17th Street, Santa Ana, California, are hereby revoked under the provisions set forth in Section 12-104 (D) of the Santa Ana Municipal Code; and

B. hereby ordered, under Government Code Section 38773 and Section 12-104(E) of the Santa Ana Municipal Code, to summarily abate the above mentioned public nuisances immediately, by terminating, or causing to be terminated, the exhibition of the above described lewd films and to voluntarily surrender possession of the same to the Court having

jurisdiction of the legal proceedings which the City Attorney has been ordered to institute under Section 12-105 of the Santa Ana Municipal Code. Each of the above mentioned persons shall notify the City Council of Santa Ana by sworn affidavit of him compliance with this Order of Summary Abatement, as required by Section 12-104(E) of the Santa Ana Municipal Code.

Section 7. United Artists Theaters, Inc., Allison Honer Co., a Partnership, Bank of America National Trust and Savings Association, M.B.F.G. Theater Circuit, Inc., and JOHN DOES 1 through 4, and all other persons of record, having legal or equitable title in the real property known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana

Theater", are hereby informed and given notice that:

A. Under Sections 12-104(F) and 12-105 of the Santa Ana Municipal Code, the City Attorney has been ordered to institute legal proceedings under Civil Code Sections 3491 and 3494, and Civil Procedure Code Section 731, naming them as defendants in an action to abate the same, and to seek restitution for the costs of abatement, including:

(1) investigative costs;

(2) court costs;

(3) reasonable attorney's fees arising out of preparations for and trial of the cause, and appeals therefrom; and

(4) printing costs of trial and appellate briefs and all other papers filed in such proceedings.

B. All positive prints of the above described 26 lewd films and previews are considered to be contraband and the subject of forfeitures as provided for in Section 12-104 (G)(3) of the Santa Ana Municipal Code.

C. From and after service on the place or its manager, or acting manager, or person then in charge of such place, of a certified copy of Ordinance NS. 1325, and a certified copy of this Resolution, any and all moneys paid thereafter as admission price to the exhibition of such lewd films are considered to be a public nuisance as personal property used in conducting and maintaining such nuisances, and that a forfeiture of the same and other admission fees will be requested in the judicial proceedings required by Ordinance No. NS. 1325.

Section 8.

A. The City Attorney is hereby ordered to provide for delivery of a certified copy of this Resolution and a certified copy of Ordinance NS 1325 in any manner normally used to effectuate personal service of process as directed in Code of Civil Procedure, Section 415.10 through 416.90 to United Artists Theaters, Inc., Allison Honer Co., a Partnership, and JOHN DOES 1 through 6, and to all other persons of record having any legal or equitable interest in the real property, known as 1565 West 17th Street, Santa Ana, California, on which is located the motion picture business commonly known as the "Mitchell Brothers' Santa Ana Theater", and to the manager or acting manager or persons in charge of said establishment.

B. The City Attorney is hereby ordered to proceed as directed in Section

12-105 of the Santa Ana Municipal Code, and to take all steps and do all things necessary to abate such nuisances and obtain the relief designated therein, through the judicial proceedings specified therein.

ADOPTED this 26th day of October, 1976, by the following vote:

AYES,	COUNCILMEN:	Yamamoto, Brandt, Ortiz, Ward
NOES,	COUNCILMEN:	None
ABSENT,	COUNCILMEN:	Bricken, Evans
ABSTAINED,	COUNCILMEN:	Garthe

ATTEST: /s/ John Garthe
MAYOR

/s/ Florence I. Malone
CLERK OF THE COUNCIL

APPROVED AS TO FORM:

/s/ Keith L. Gow

KEITH L. GOW

CITY ATTORNEY

THE FOREGOING INSTRUMENT IS A FULL, TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: Nov. 2 1976

FLORENCE I. MALONE,

CLERK OF THE COUNCIL,

CITY OF SANTA ANA

(SEAL)

FLORENCE I. MALONE

BY /s/ MARTHA E. LEA

DEPUTY

APPENDIX D

(Reference: Petition at pgs. 10, 17, 20,21, 35, 42, 56

Time and Motion Studies* of the motion picture films for which the Register of Copyrights in the U.S. Copyright Office issued a "Certificate of Registration of a Claim to Copyright" and as to which the City Council made alleged infringing copies pursuant to Santa Ana Ordinance N.S. 1287 and Resolution 76-134,

Behind the Green Door	D-1 thru D-27
Resurrection of Eve	D-29 thru D-59
Sodom and Gomorrah - The Last Seven Days	D-61 thru D-97
The Autobiography of A Flea	D-99 thru D-133
C.B. Mamas	D-135 thru D-155
Inside Marilyn Chambers	D-157 thru D-185

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"BEHIND THE GREEN DOOR"

The motion picture film "Behind the Green Door" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on April 18, 1973.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 1 OF 13 PARTS
(0:17-0:24) OPENING SCENE. MALE DRIVING A VEHICLE. (0:30-1:16) SCENE SHIFTS TO INSIDE A ROADSIDE DINER. (1:19-2:13) TWO MALES SEATED IN DINER TALK WITH CHEF AS WAITRESS SERVES THEM. ONE MALE RELATES STORY. (2:15-3:27) A FLASH BACK. A SMALL CONVERTIBLE SPORTS CAR APPEARS WITH GIRL DRIVING ON WINDING ROAD AS FILM CREDITS AND TITLE APPEAR. (3:31-3:45) GIRL ARRIVES AT A RESORT AND IS GREETED BY MAN BEHIND COUNTER. (3:48-5:54) TWO MEN WHO WERE AT DINER ARE SEATED TALKING IN RESORT OPEN DINING AREA. GIRL WHO ARRIVED ENTERS SCENE AND SITS AT TABLE.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 2 OF 13 PARTS
(5:5d-7:19) TWO MEN CONTINUE TALKING. (7:21-7:46) NIGHT SCENE - WOMAN DESCENDS OUTSIDE STAIRWAY. AUTO STOPS - MEN GET OUT AND FORCE WOMAN INTO CAR. ONE OF TWO ABDUCTORS RUNS AFTER AUTO SHOUTING "HEY, YOU SON-OF-A-BITCH, STOP!" (7:49-9:37) TWO MEN ENTER LARGE PLUSH-LIKE ROOM OR FOYER OF A NIGHT CLUB AND ARE MET BY LARGE THIRD MAN WHO BURSTS A FOOTBALL WITH BARE-HANDS AFTER ASKING THE TWO MEN THEIR NAMES, PUTS MASKS ON THEM AND ORDERS A WOMAN TO SHOW THEM TO THEIR SEATS. (9:41-10:19) CAMERA PANS INTERIOR OF CLUB. CLOWN IS PERFORMING ON STAGE. (10:23-10:43) AUTO ENTERS ALLEY AND STOPS. TWO MEN AND ABDUCTED WOMAN GET OUT OF AUTO AND ENTER BUILDING. (10:47-11:18) ABDUCTED GIRL IS BROUGHT INTO ROOM WITH ANOTHER WOMAN WHO ORDERS THE TWO ABDUCTORS TO LEAVE. (11:22-11:29) SECOND WOMAN TALKS TO ABDUCTED VICTIM.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 3 OF 13 PARTS
(11:32-15:22) WOMAN CONTINUES TO CALM AND SOOTHE THE FEMALE VICTIM BY TALKING TO HER AND FONDLING HER. (15.26-17:03) CLOWN PERFORMING IN PANTOMIME AS AUDIENCE WATCHES.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 4 OF 13 PARTS
(17:07-18:24) SPOTLIGHT FOCUSES ON GREEN DOOR, WHICH OPENS. ABDUCTED GIRL IS LED OUT BY SEVERAL MEN IN ROBES TO CENTER STAGE. (18:24-22:14) GIRL IS DISROBED BY OTHER WOMEN AND FONDLED AND KISSED AS AUDIENCE WATCHES. (22:17-22:31) GIRL IS RESTRAINED BY SEVERAL WOMEN AS ANOTHER WOMAN PERFORMS CUNNILINGUS ON HER. (22:35-22:46) CAMERA SHIFTS FROM VICTIM TO AUDIENCE AND BACK SHOWING AUDIENCE REACTION.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 5 OF 13 PARTS
(22:49-26:35) AUDIENCE CONTINUES TO WATCH AS GIRL VICTIM IS HELD SPREAD EAGLED ON HER BACK ON STAGE FLOOR AS SEVERAL OTHER FEMALES KISS AND SUCK HER BREASTS AND ANOTHER FEMALE PERFORMS CUNNILINGUS ON HER. (26:39-28:20) BLACK MALE ENTERS STAGE WITH PENIS EXPOSED THROUGH PANTS WITH CUTOUT, AND APPROACHES RESTRAINED VICTIM ON FLOOR. OTHER WOMEN DIRECT MALE TO VICTIM'S VAGINA.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 6 OF 13 PARTS
(28:24-29:16) WOMEN HOLD VICTIM ON FLOOR AS MALE PERFORMS CUNNILINGUS ON HER AS AUDIENCE WATCHES.
(29:19-33:54) CLOSEUP OF MALE PENIS ENTERING VAGINA OF VICTIM. MALE PERFORMS SEXUAL INTERCOURSE WHILE FEMALE WRITHES ON FLOOR STILL HELD BY OTHER FEMALES.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 7 OF 13 PARTS
(33:59-36:42) MALE PERFORMS SEXUAL INTERCOURSE TO RHYTHM OF BONGO DRUMS BRINGING VICTIM TO CLIMAX. (36:45-36:56) CAMERA SHOWS AUDIENCE REACTION -- ONE WOMAN MASTURBATES. (36:59-37:44) BLACK MALE EXITS STAGE. AUDIENCE ANTICIPATES NEXT ACT. (37:48-39:22) THREE MAN TRAPEZE DEVICE IS LOWERED FROM CEILING. THREE MEN MOUNT IT WITH PENISES EXPOSED. (39:29) CLOSEUP OF A WOMAN IN AUDIENCE MASTURBATING WITH HER FINGERS WHILE VIEWING STAGE ACTIVITY.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

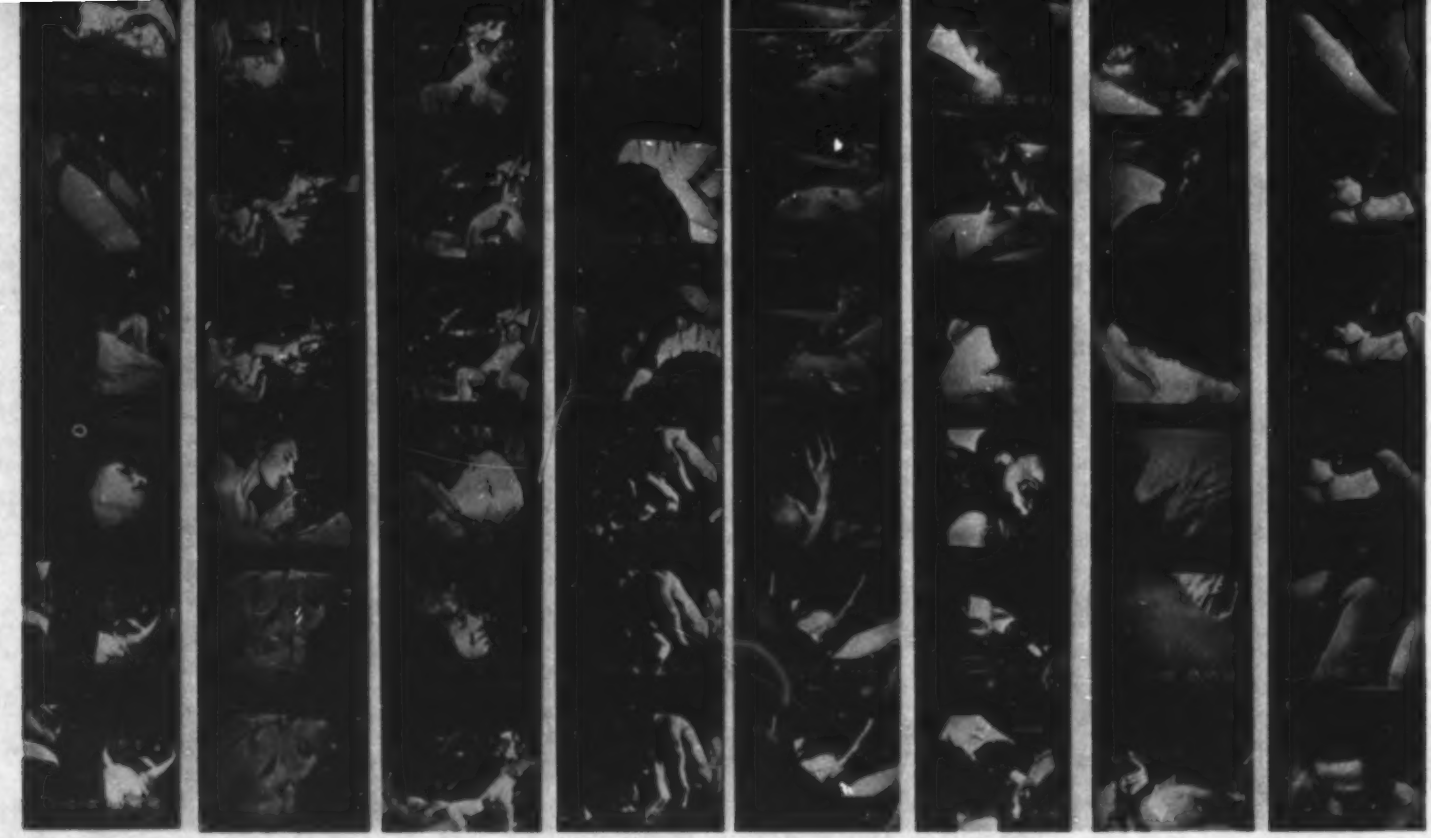




"BEHIND THE GREEN DOOR"
PART 8 OF 13 PARTS
(39:53-41:45) VICTIM IS TAKEN TO CENTER OF TRAPEZE WITH THREE MALES. SHE THEN MASTURBATES TWO MALES WHILE ALSO PERFORMING FELLATIO ON THIRD MALE. (41:48-41:59) ANOTHER FEMALE IN AUDIENCE FONDLES HER OWN BREAST AS SHE VIEWS STAGE. (42:02-45:03) VICTIM CONTINUES TO MASTURBATE TWO MALES WHILE PERFORMING FELLATIO ON THIRD MALE. WHILE FOURTH MALE PERFORMS SEXUAL INTERCOURSE ON HER FROM BENEATH HER. AUDIENCE ENGAGES IN SEXUAL ACTIVITY.

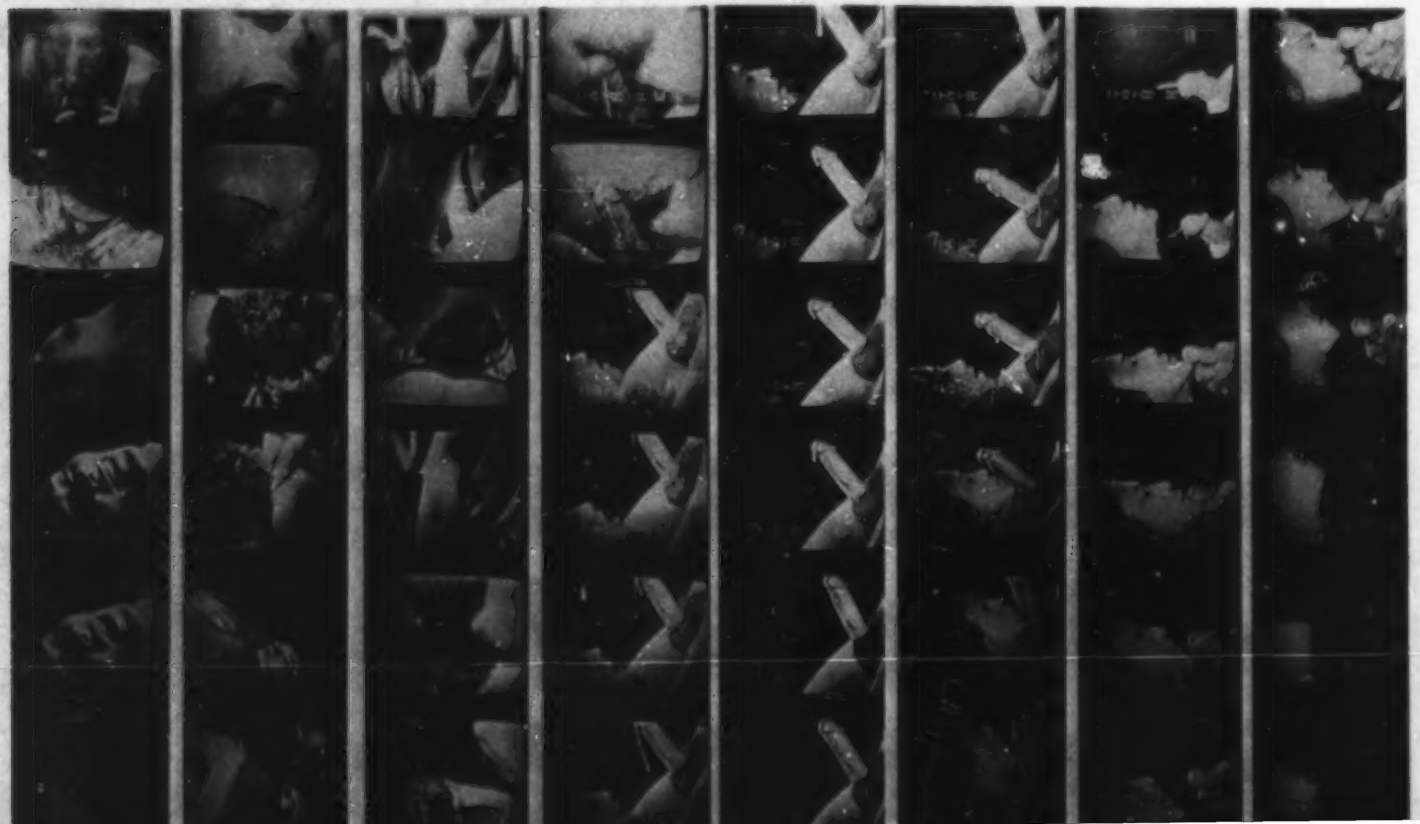
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"BEHIND THE GREEN DOOR"
PART 9 OF 13 PARTS
(45:07-47:50) SEXUAL INTERCOURSE - CUNNILINGUS. (47:54-50:38) AUDIENCE ENGAGES IN SEXUAL ACTIVITY.
MASTURBATION, CUNNILINGUS, FELLATIO, GROUP ORGY.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).

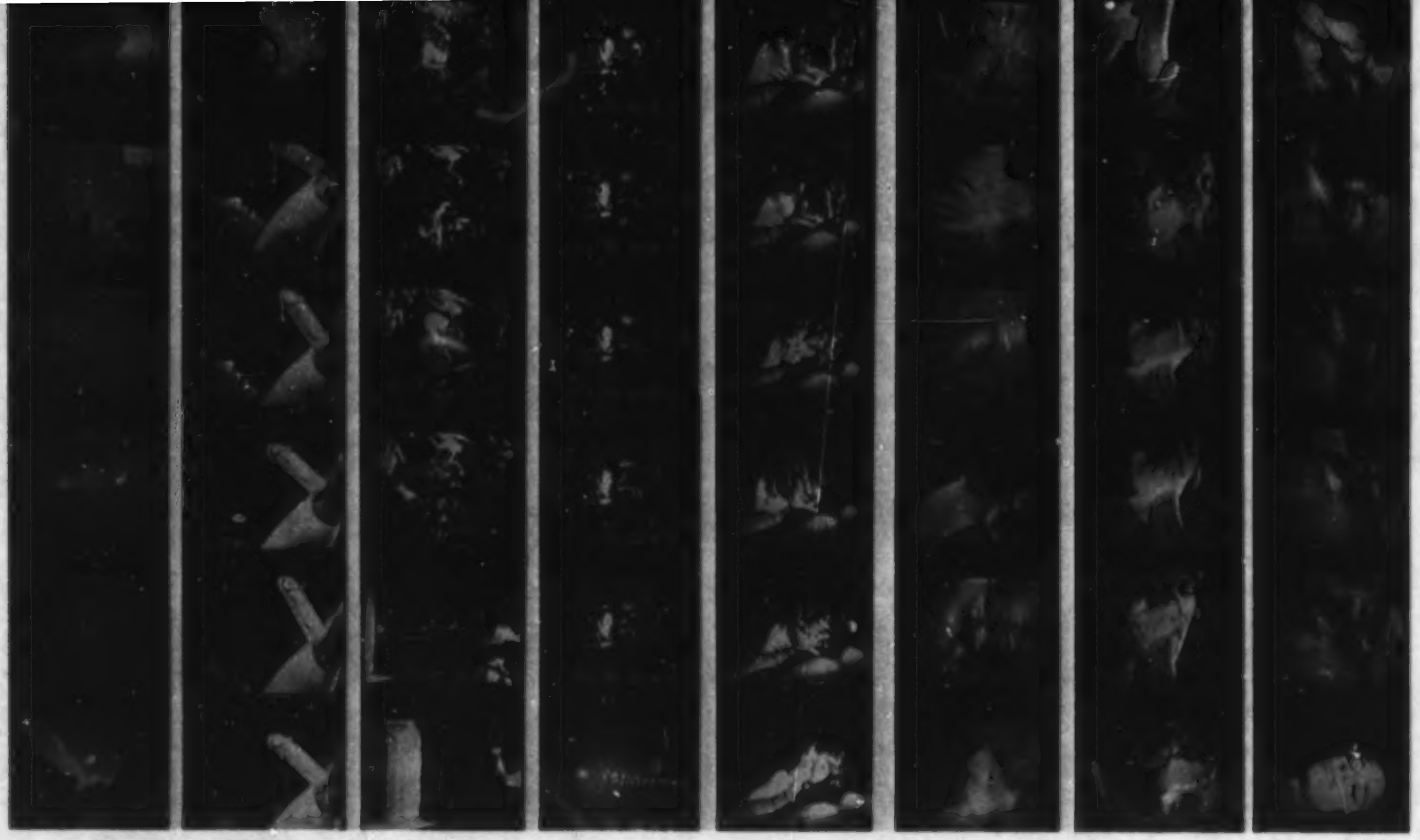




"BEHIND THE GREEN DOOR"
PART 10 OF 13 PARTS
(50:41-51:02) BLACK MALE PERFORMS SEXUAL INTERCOURSE ON GIRL VICTIM THEN MASTURBATES HER VAGINA. (51:05-52:05) FELLATIO, CUNNILINGUS, SEX ORGY CONTINUES. (52:08-52:50) CLOSEUP OF SEXUAL INTERCOURSE, PENIS EJACULATES ON FEMALE PUBIC HAIR. (52:54-56:12) FEMALE PLACES FACE BENEATH PENIS AS IT EJACULATES. SEMEN DRIPS ON FEMALE VICTIM'S MOUTH AND THROAT. SHE THEN LICKS SEMEN FROM BLACK PENIS. MALE THEN RUBS SEMEN FROM PENIS ON FEMALE'S NOSE AND MOUTH.

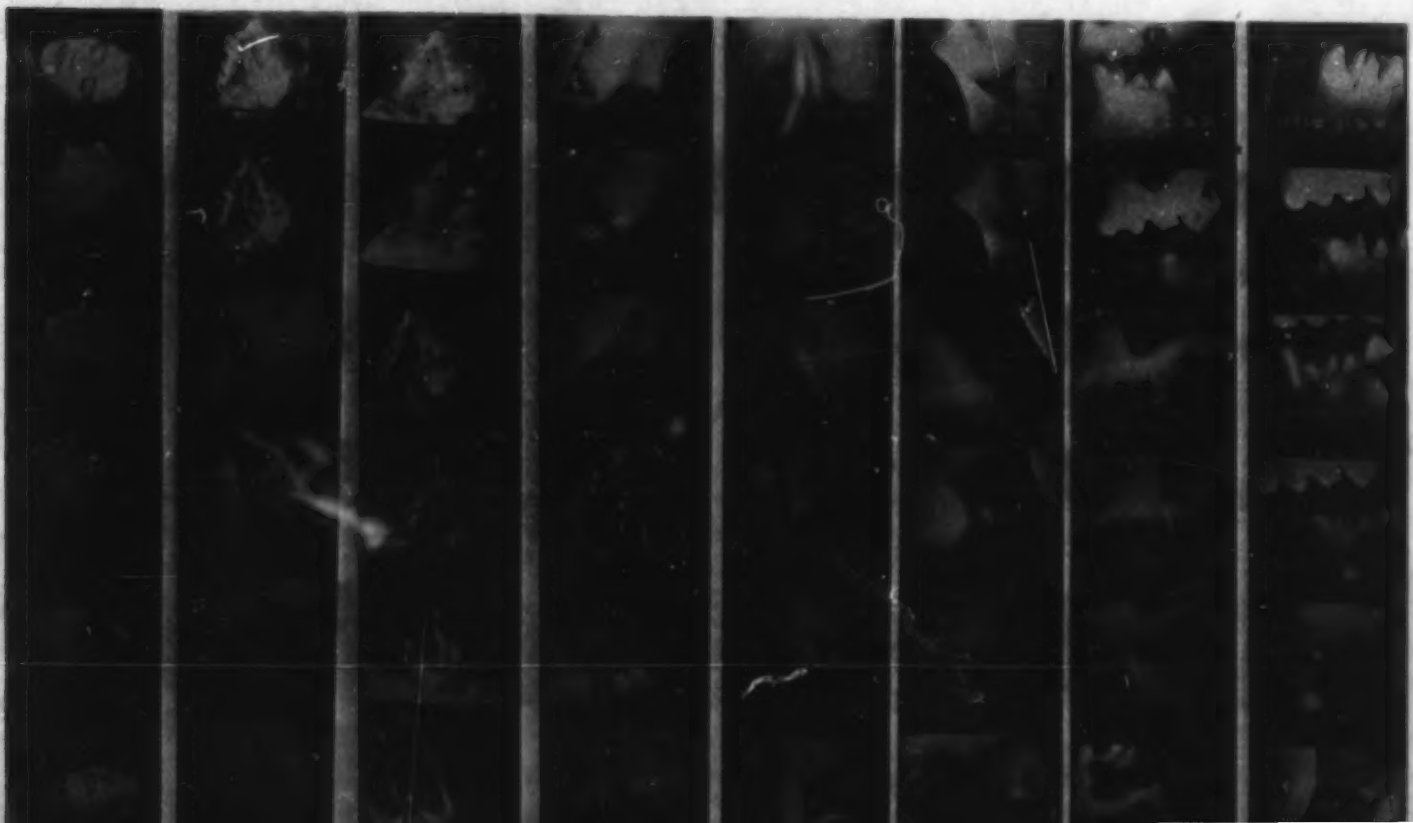
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"BEHIND THE GREEN DOOR"
PART 11 OF 13 PARTS
(56:15-57:56) SPECIAL EFFECTS PHOTOGRAPHY - PENIS EJACULATES AND SEMEN POURS INTO FEMALE'S MOUTH, FEMALE PERFORMS ORAL SODOMY ON BLACK PENIS AND LICKS SEMEN OFF. (58:00-58:17) ORGY CONTINUES AND THEN VICTIM IS CARRIED OFF STAGE. (58:20-59:13) STORY RETURNS TO TWO MEN AT DINER RECOUNTING STORY. (59:16-101:22) CLOSEUP OF FEMALE PERFORMING FELLATIO. (101:25-101:46) CUNNILINGUS.

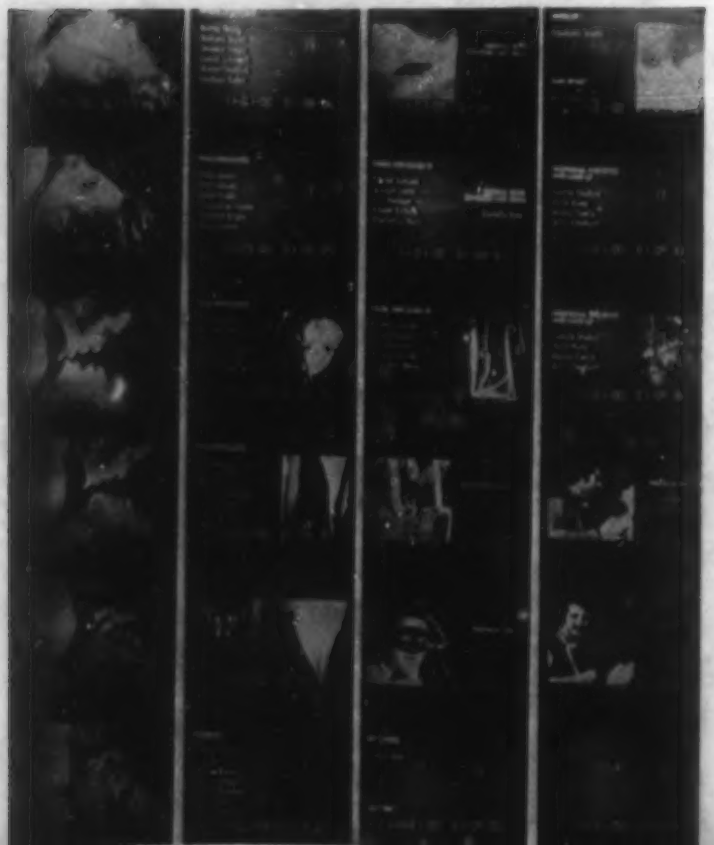
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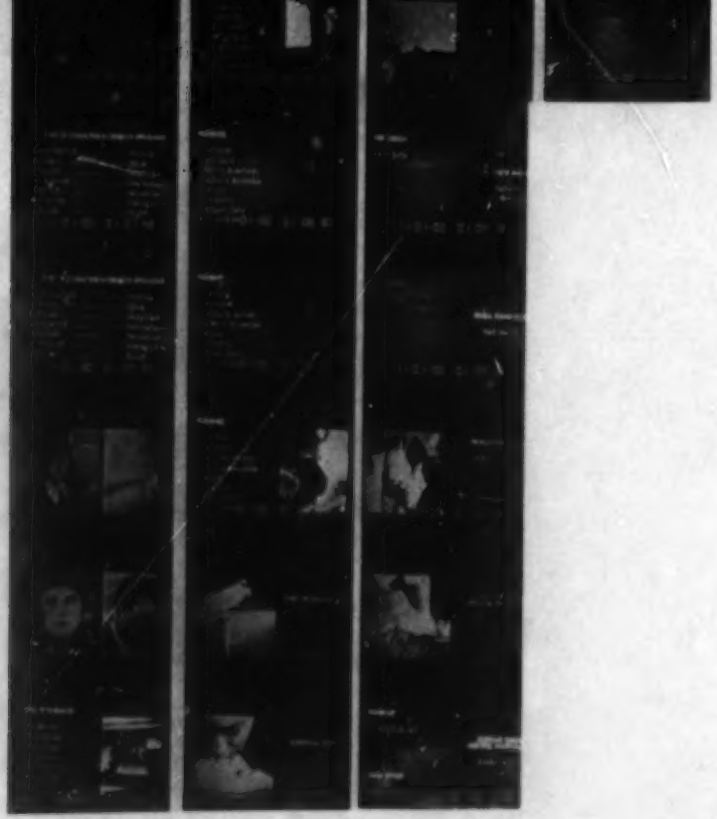




"BEHIND THE GREEN DOOR"
PART 12 OF 13 PARTS
(1:01:50-1:02:26) CLOSEUP OF MALE PERFORMING CUNNILINGUS ON VAGINA. (1:02:28-1:07:20) FEMALE MOUNTS MALE IN SEXUAL INTERCOURSE, CLOSEUP OF PENETRATION. MALE THEN MOUNTS FEMALE IN SEXUAL INTERCOURSE.

"BEHIND THE GREEN DOOR": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24594) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO JARTECH, INC. (DATE OF ISSUANCE: APRIL 18, 1973).





"BEHIND THE GREEN DOOR"
PART 13 OF 13 PARTS
(207:24-209:50) MALE AND FEMALE IN SEXUAL INTERCOURSE TO END - MALE SUPERIOR.

APPENDIX D

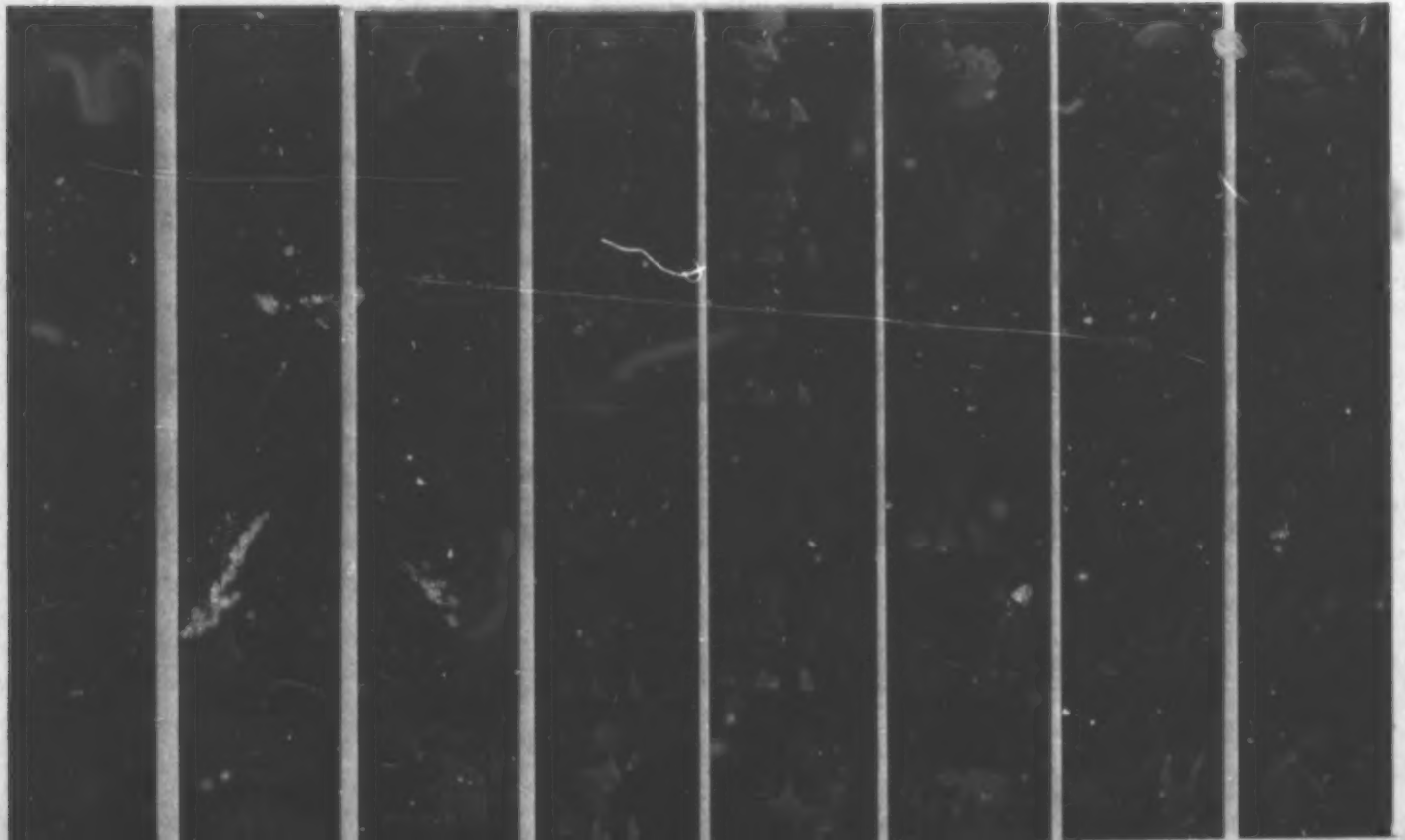
TIME-MOTION STUDY* OF THE FILM

"RESURRECTION OF EVE"

The motion picture film "Resurrection of Eve" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 10, 1973.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

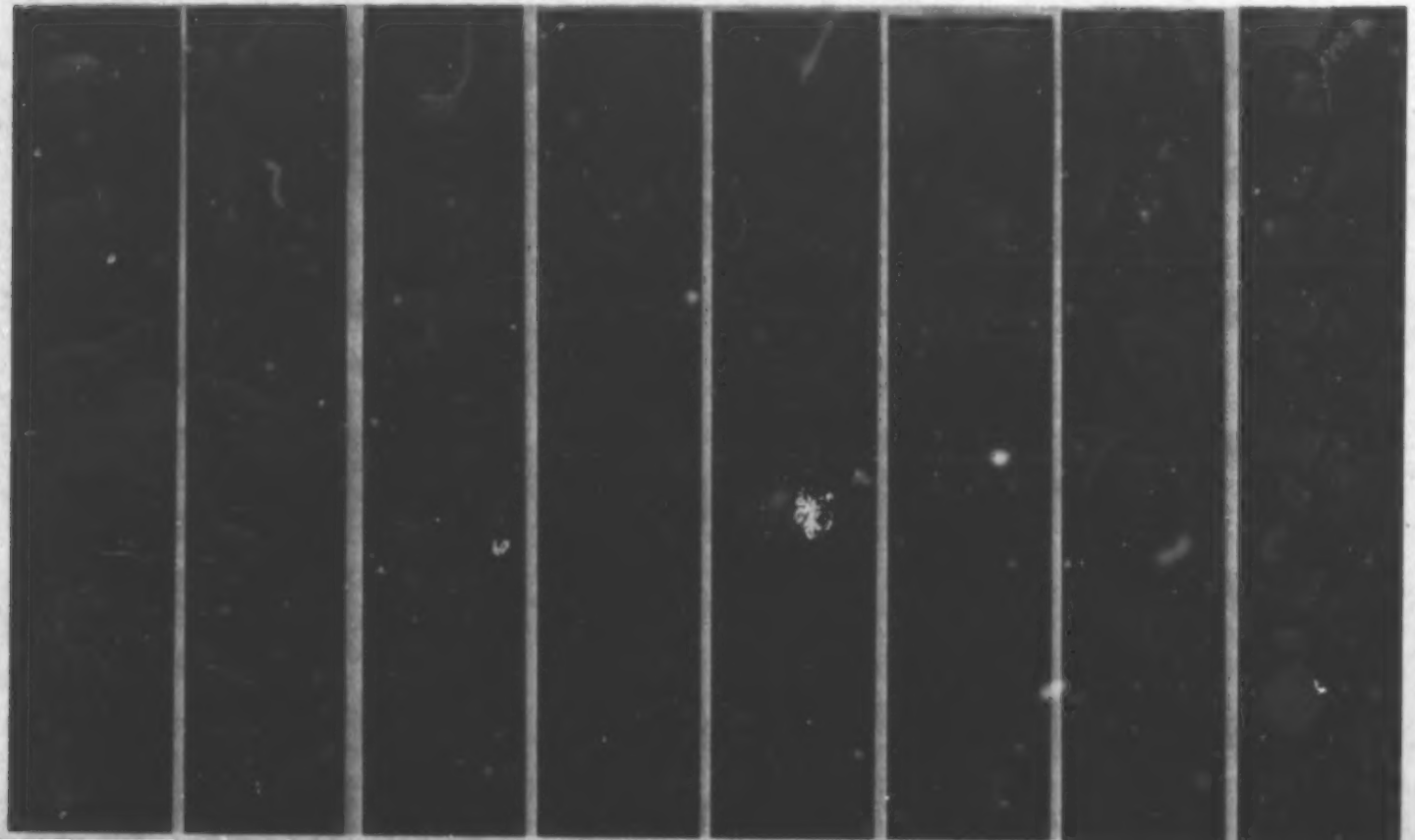
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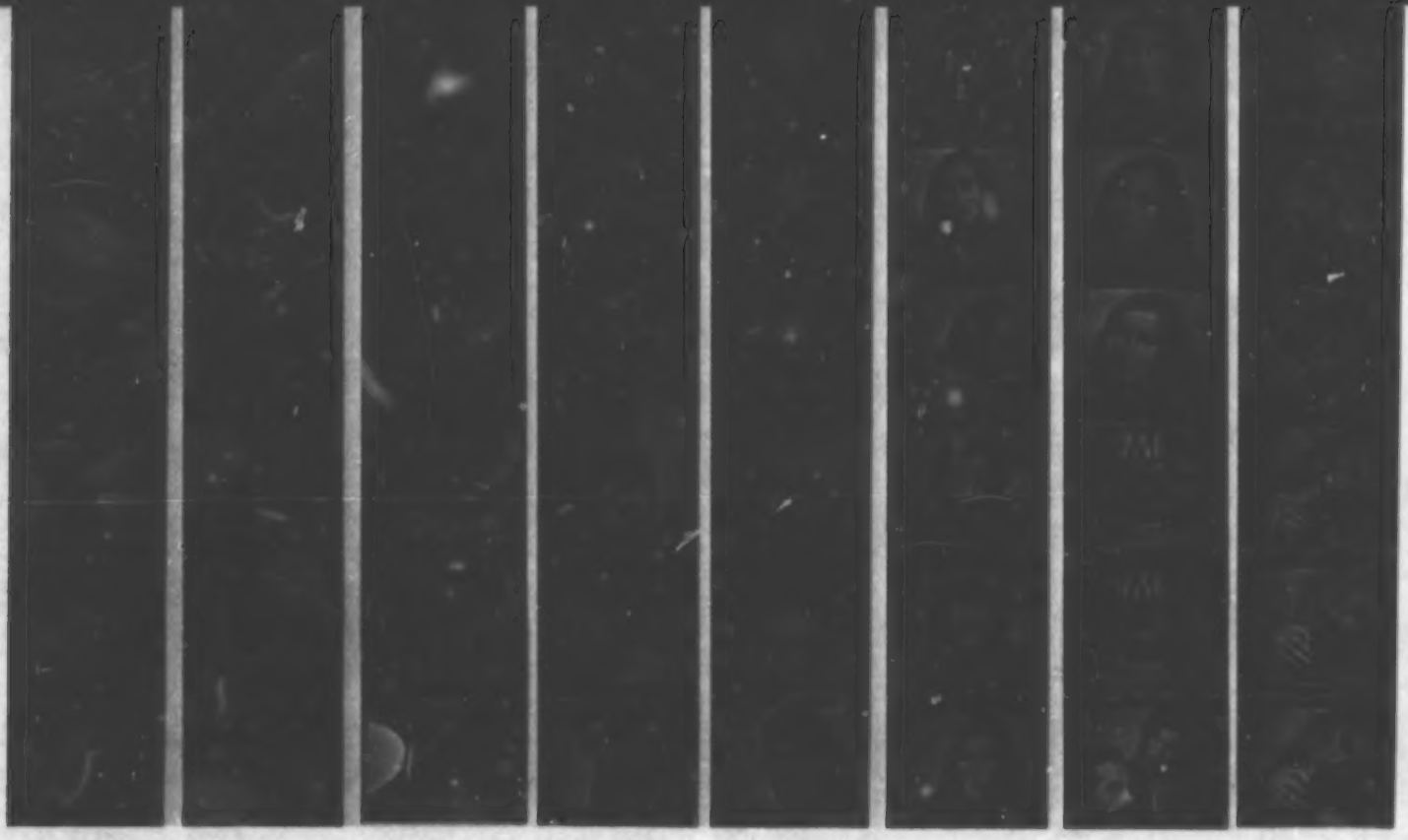




"RESURRECTION OF EVE"
PART 1 OF 15 PARTS
(00:07-00:35) CREDIT AND TITLE. (00:39-01:00) PRODUCER'S PREFACE TO STORY. (01:09-01:35) GIRL AT SEASHORE FACES HORIZON. (01:38-01:49) SAILOR AND GIRL APPEAR. (01:53-02:13) WOMAN AT SEASHORE STILL LOOKING OUT TO SEA. (02:20-03:54) SAILOR TALKS TO YOUNG GIRL IN APARTMENT. TEACHES HER TO KISS WITH HER TONGUE BY USING RAGGEDY ANN DOLL. (03:58-04:36) SAILOR THEN KISSES GIRL. (04:40-04:57) SAILOR SHOWS GIRL ACT OF CUNNILINGUS ON RAGGEDY ANN DOLL. (05:00-05:39) SAILOR LAYS GIRL BACK ON TABLE AND PERFORMS CUNNILINGUS ON HER.

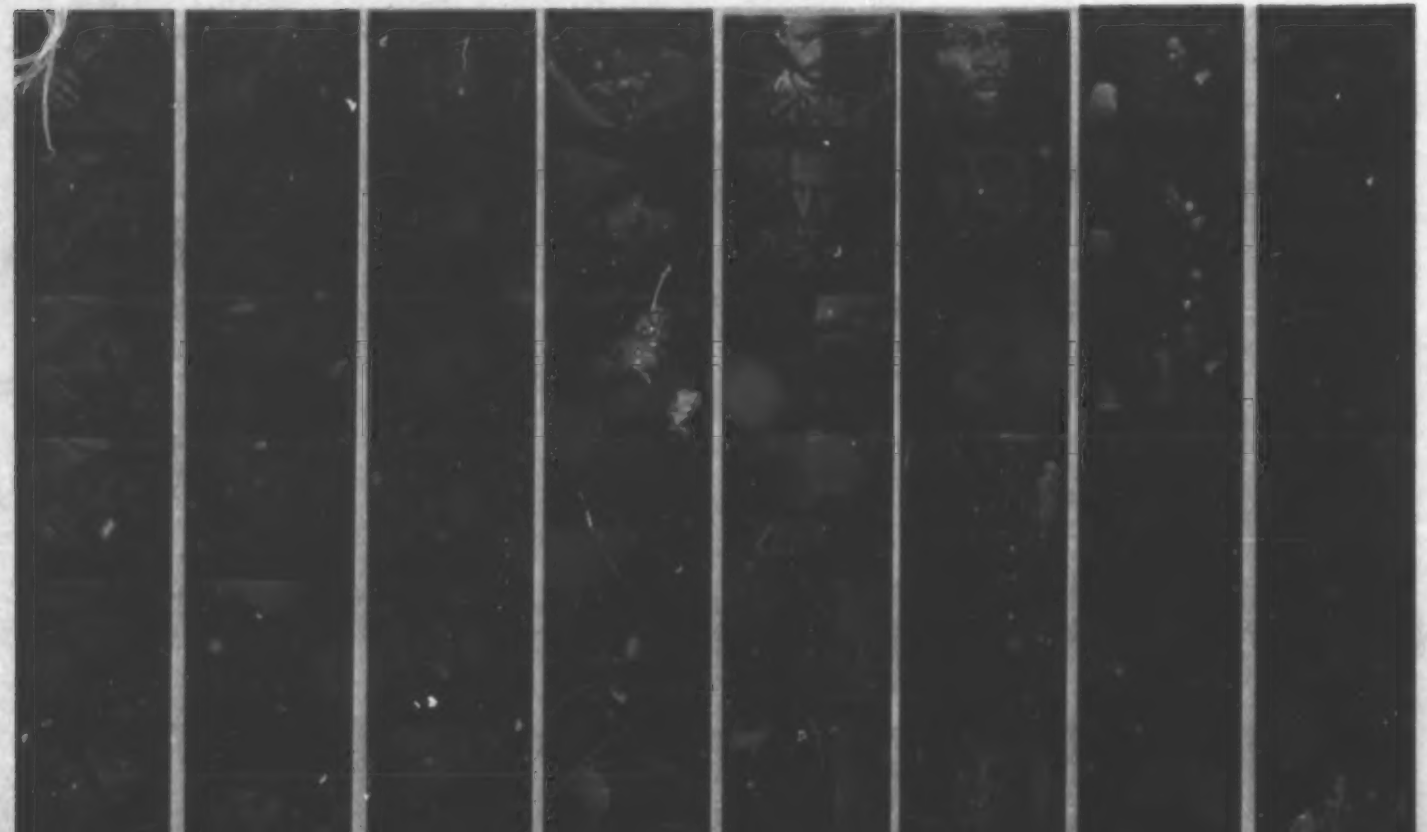
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"RESURRECTION OF EVE"
PART 2 OF 15 PARTS
(05:42-06:59) CUNNILINGUS CONTINUES. (07:03-08:16) SAILOR HAS GIRL PERFORM FELLATIO ON HIM. (08:19-08:40) GIRL'S MOTHER APPEARS THROWS SAILOR OUT. (08:44-08:58) FLASHBACK TO WOMAN AT BEACH REMEMBERING. (09:01-09:08) HOSPITAL SCENE. (09:12-09:33) GYM SCENE BLACK FIGHTER AND MANAGER. MALE AND FEMALE AT TABLE. (09:36-11:00) MALE AND FEMALE CONVERSE AT TABLE. (11:03-11:14) FEMALE PERFORMS FELLATIO ON MALE.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 3 OF 15 PARTS
(11:17-12:10) FELLATIO CONTINUES. (12:13-13:33) SEXUAL INTERCOURSE, MALE SUPERIOR. (13:37-14:08) MALE PERFORMS AS DISC JOCKEY ON RADIO. (14:12-14:22) HOSPITAL SCENE; (14:26-14:47) FLASHBACK EVE TALKS TO BLACK FIGHTER (14:50-15:14) FLASHBACK, EVE TALKS TO DISC JOCKEY. (15:18-15:21) HOSPITAL FLASHBACK (15:25-15:49) DISC JOCKEY TELLS GIRLFRIEND THEY ARE THROUGH. (15:53-16:21) HOSPITAL FLASHBACK. (16:24-16:49) MALE ANNOYS FEMALE WHO IS WORKING AT RADIO.

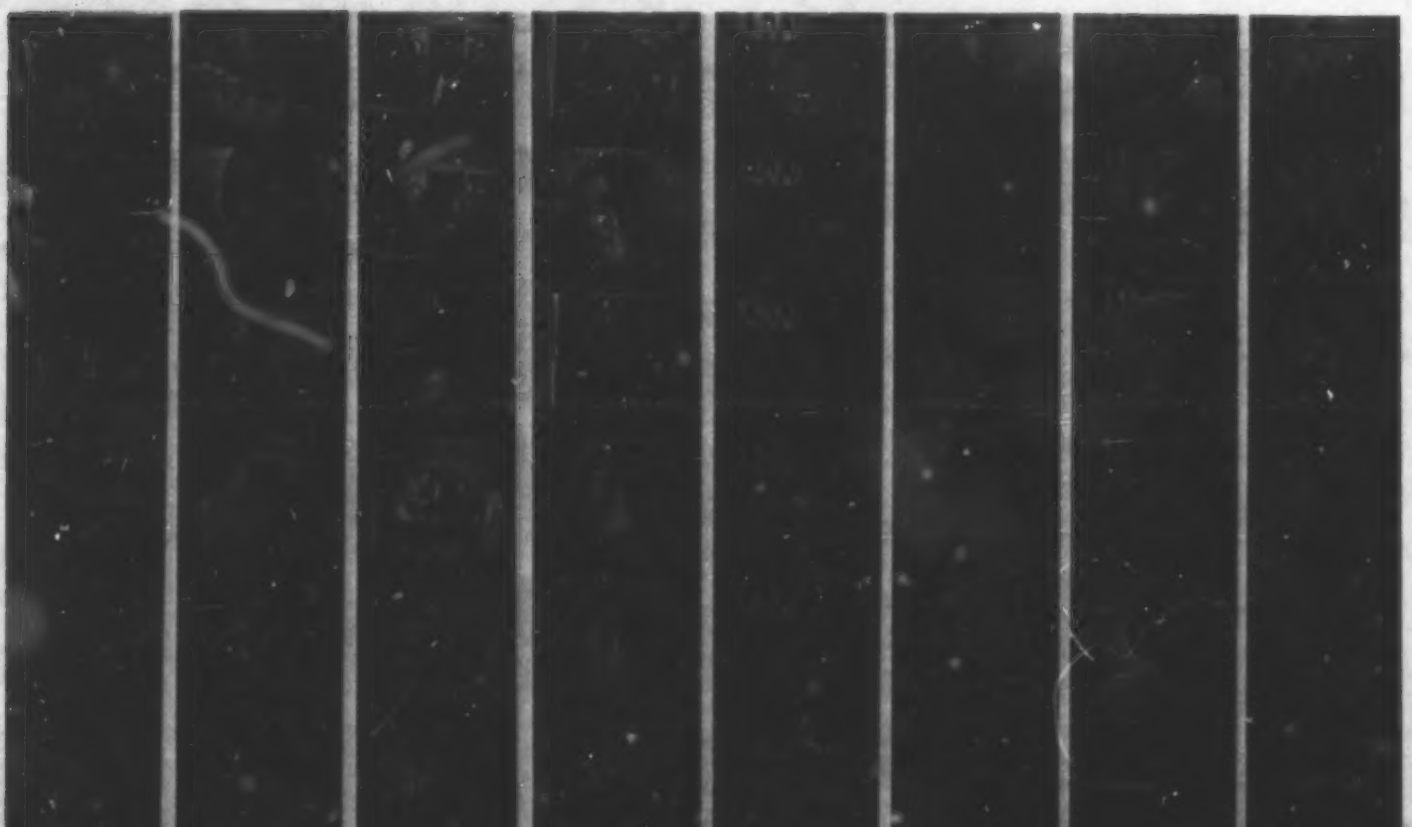
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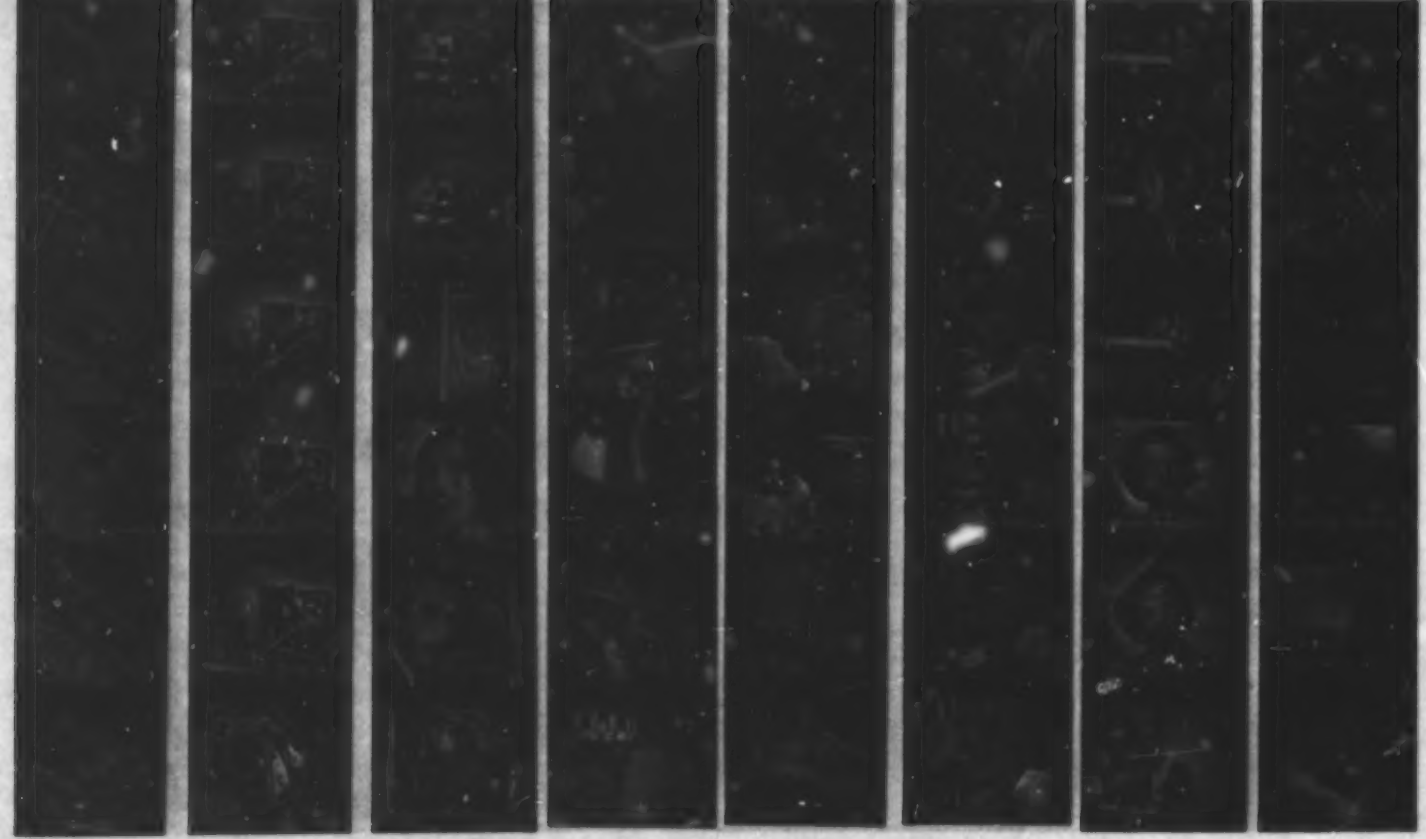




"RESURRECTION OF EVE"
PART 4 OF 15 PARTS
(16:52-17:37) DISC JOCKEY ANNOYS FEMALE WORKING AT RADIO STATION. (17:41-19:22) SEXUAL INTERCOURSE. (19:26-19:36) OUTDOOR SCENE. (19:45-19:47) SEXUAL INTERCOURSE. (19:50-19:57) EVE AND FRANK TALK. (20:00) BLACK FIGHTER SKIPS ROPE. (20:04-20:07) HOSPITAL SCENE EVE'S FACE GROTESQUE AND SCARRED. (20:11-20:18) OUTDOOR BEACH SCENE. (20:25-20:39) FRANK AND EVE TALK AND EMBRACE. (20:42-20:46) SEXUAL ACTIVITY. (20:49-21:03) OUTDOOR PARK SCENE. (21:07-21:35) CLOSEUP OF MALE FACE BETWEEN FEMALE'S LEGS PERFORMING CUNNILINGUS. (21:38-21:42) EVE IN HOSPITAL WITH NURSE. (21:45-21:49) GYM SCENE FIGHTER WORKING OUT. (21:59-22:24) SEXUAL INTERCOURSE MALE SUPERIOR.

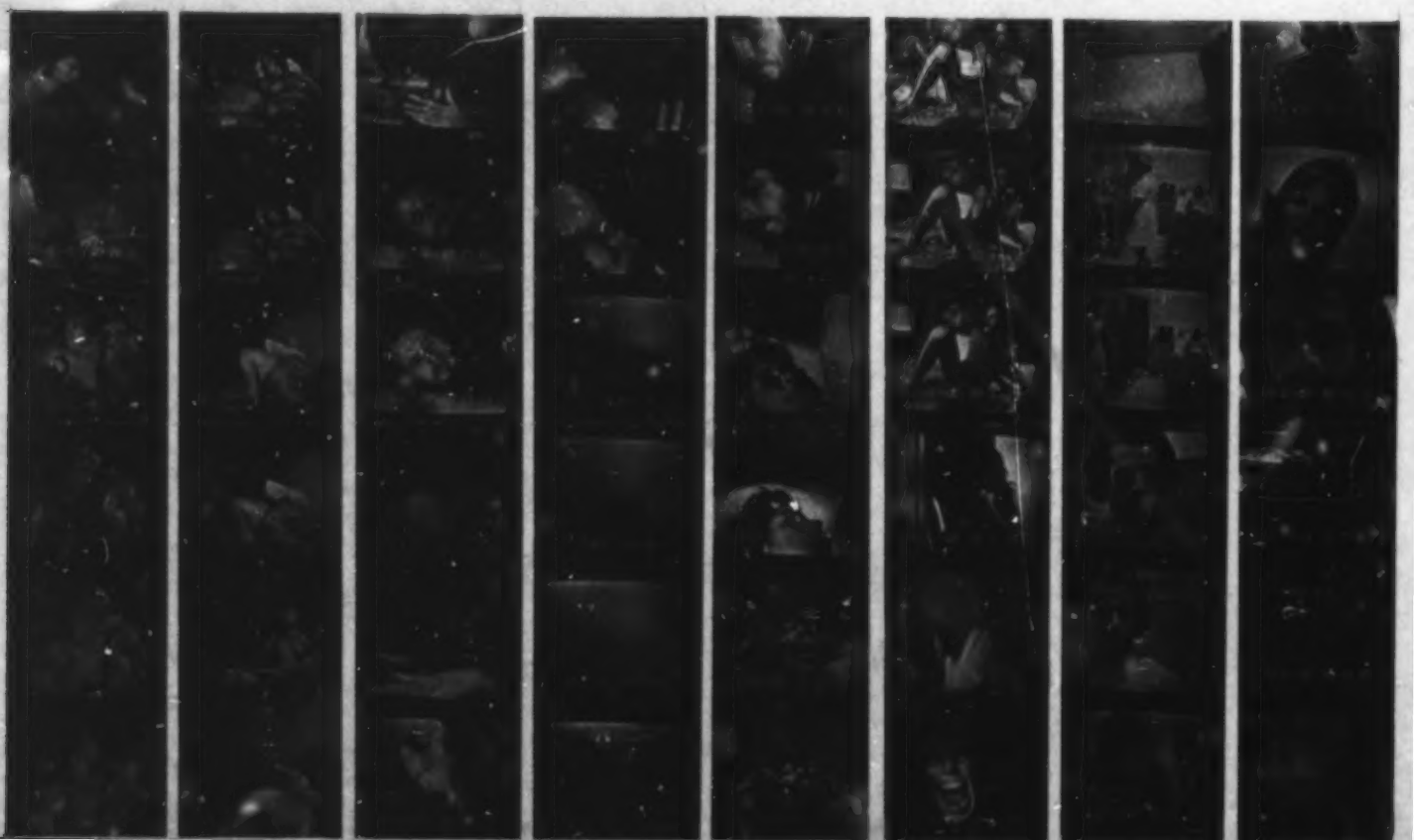
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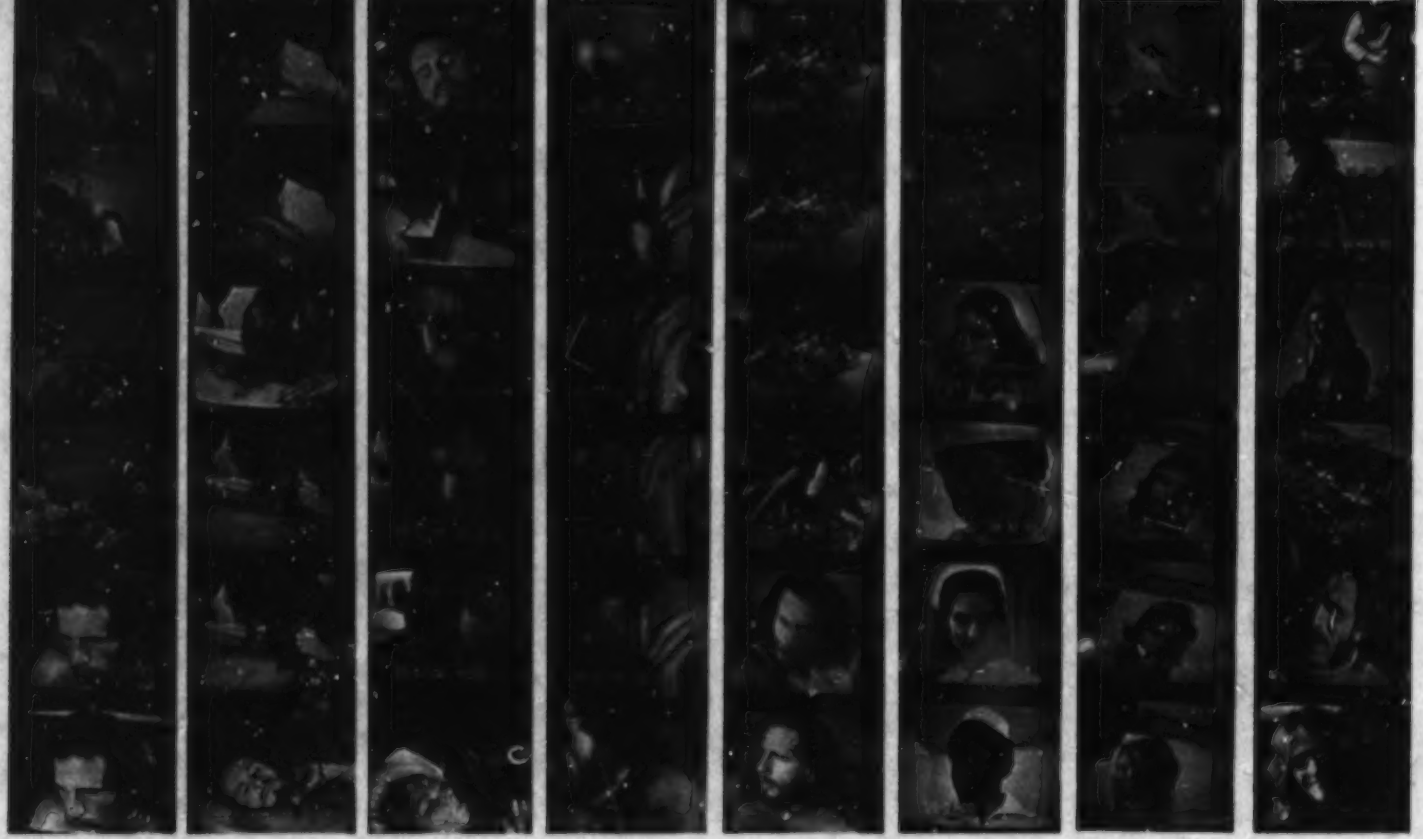




"RESURRECTION OF EVE"
PART 5 OF 15 PARTS
(22:27-23:09) SEXUAL INTERCOURSE. (23:12) EVE SCARRED. (23:16-23:58) FRANK RETURNS TO RADIO STATION. (24:00-24:57) FRANK QUARRELS WITH EX-GIRLFRIEND AT STORE COUNTER. (25:01) FIGHTER TRAINS. (25:08-26:38) FRANK WAITS AT APARTMENT FOR EVE. (26:42-27:31) EVE TELLS HIM SHE SAW BOXING MATCH WITH BLACK FIGHTER. (27:34-27:59) IN FANTASY FRANK BOXES BLACK FIGHTER.

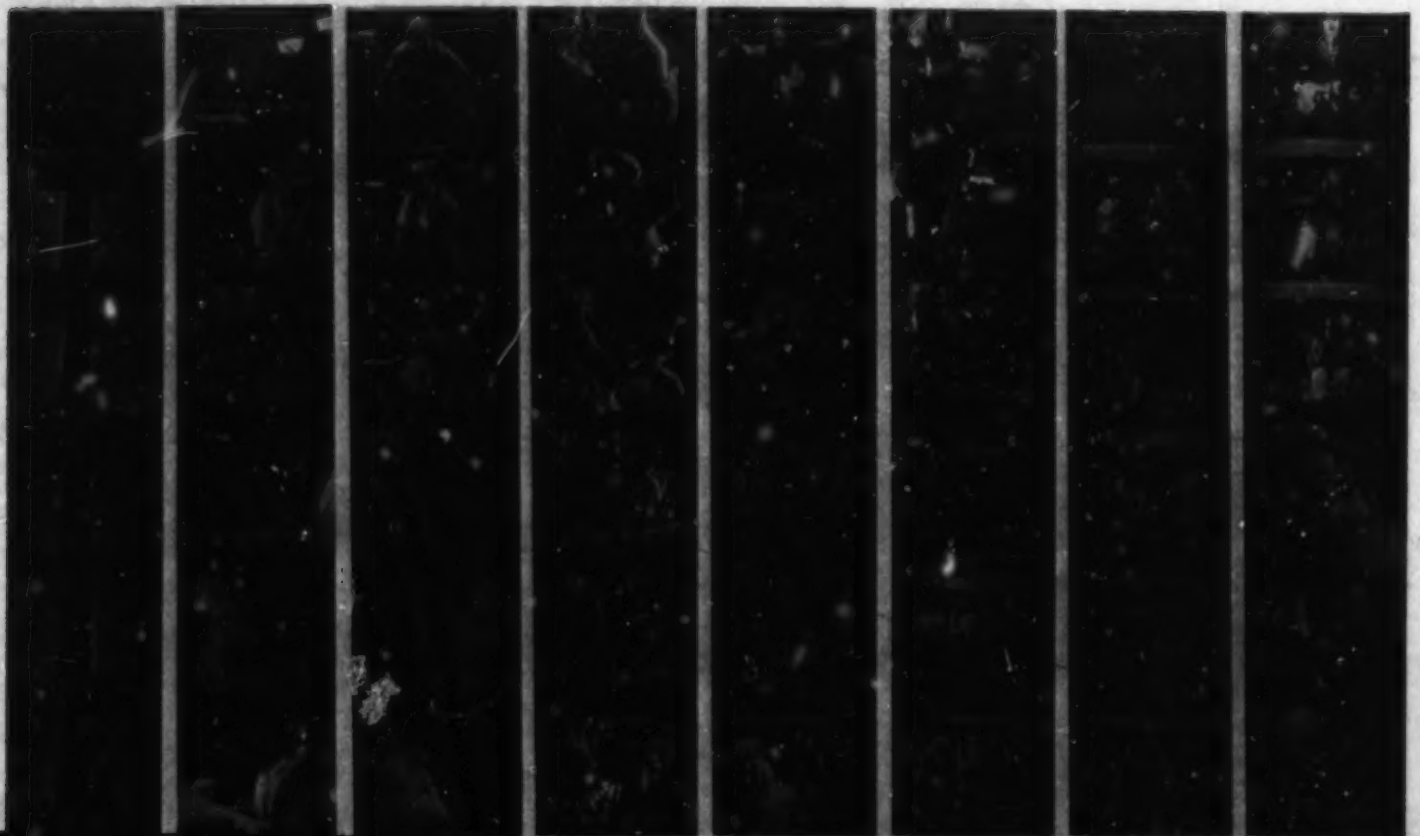
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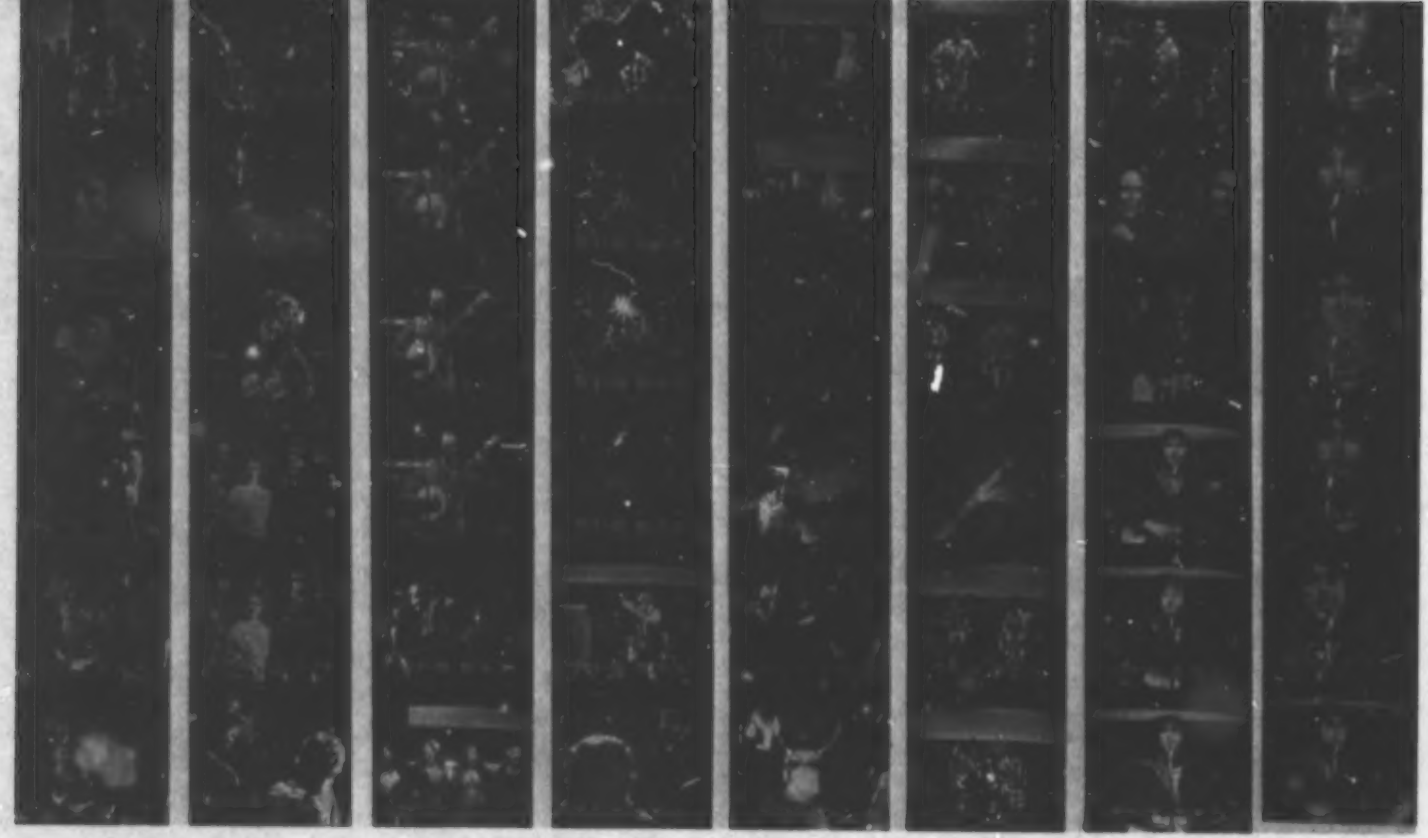




"RESURRECTION OF EVE"
PART 6 OF 15 PARTS
(26:02-28:05) SHADOW BOXING. (28:09-28:27) FRANK AND EVE TALK. (28:30-28:41) FRANK AND EVE HAVE SEXUAL INTERCOURSE. (28:44-29:57) EVE PERFORMS FELLATIO ON FRANK. (30:04-30:29) SEXUAL INTERCOURSE WITH BLACK FIGHTER (30:32-30:53) SEXUAL INTERCOURSE WITH FRANK, (30:57-31:46) EVE IS NOT SATISFIED. (31:49) EVE SCREAMS. (31:53-32:21) FLASHBACK TO EVE IN HOSPITAL. (32:23-33:13) FRANK VISITS EVE IN HOSPITAL RECOVERING FROM PLASTIC SURGERY. (33:13-33:34) CLOSEUP OF EVE RECOUPERATING.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 7 OF 15 PARTS
(33:37-39:09) FRANK AND EVE GET MARRIED - MUSICAL GROUP AND DANCERS PERFORM AT CEREMONY. BLACK MUSICAL GROUP PERFORMS FOLLOWED BY MALE SINGER.

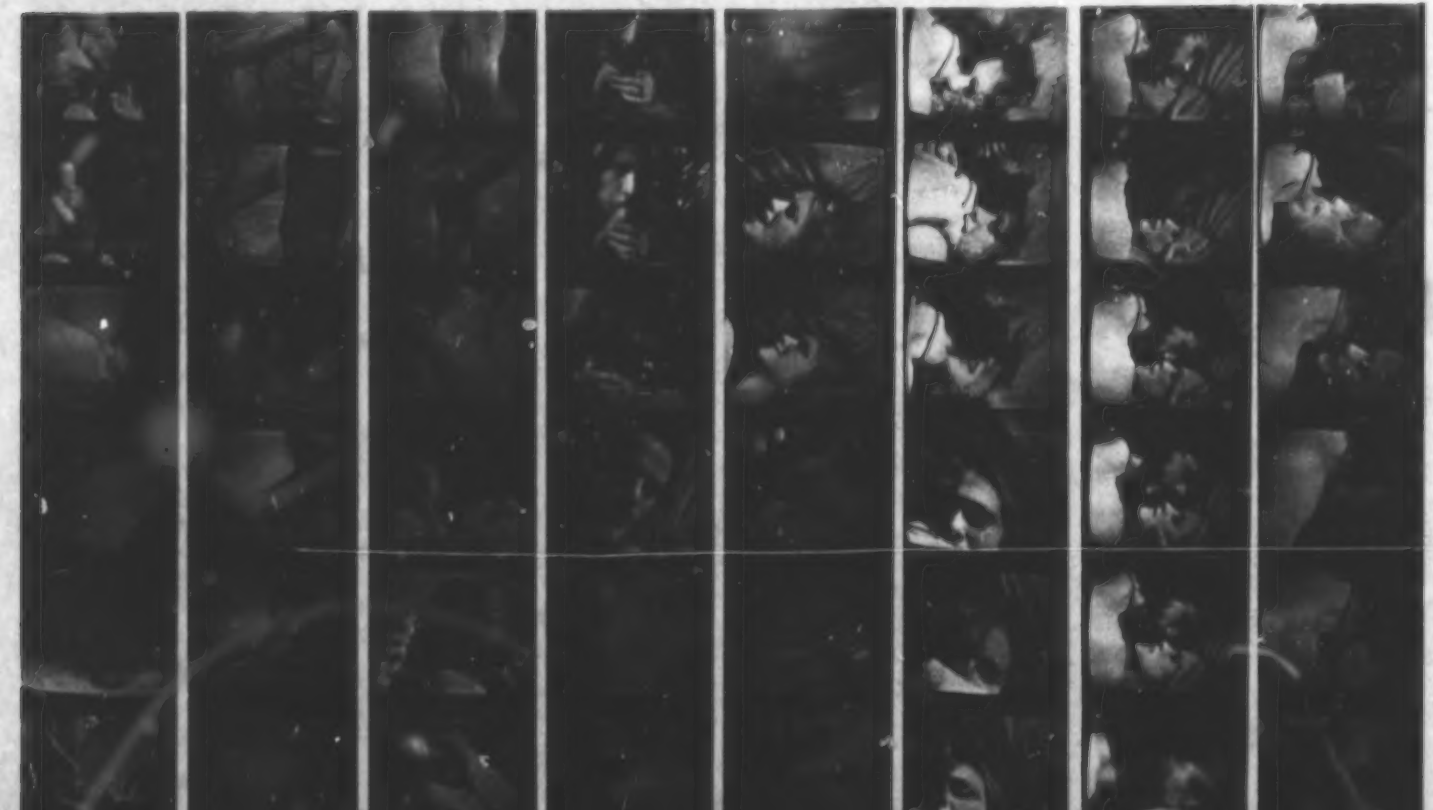
"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 8 OF 15 PARTS
(39:13-39:37) WEDDING CELEBRATION CONTINUES. (39:40-40:43) FRANK PERFORMS AS DISC JOCKEY. (40:47-41:08) FRANK AT POOLSIDE. (41:11-42:35) FRANK AND EVE EMBRACE AND KISS IN BED. (42:39-42:53) EVE VACUUMS APARTMENT. (42:56-44:44) FRANK AND EVE EMBRACE. THEY STRIP AND KISS.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 9 OF 15 PARTS
(44:48-46:22) FRANK AND EVE CONTINUE TO STRIP. (46:26-47:18) IN BED. EVE PERFORMS FELLATIO ON FRANK.
(47:25-50:20) FRANK MOUNTS EVE IN SEXUAL INTERCOURSE.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 11 OF 15 PARTS
(55:59-56:33) SEX ORGY CONTINUES. FELLATIO BY FEMALE ON MALE. MASTURBATION, CUNNILINGUS, SEXUAL INTERCOURSE. (57:01) EVE SEES FRANK HAVE INTERCOURSE WITH ANOTHER FEMALE. (57:36-59:31) EVE AND FRANK QUARREL. EVE APOLOGIZES. (59:35-61:30) EVEN AGAIN JOINS IN SEX ORGY.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 12 OF 15 PARTS
(61:34-61:35) SEX ORGY CONTINUES - FELLATIO SEXUAL INTERCOURSE, LESBIANISM, MASTURBATION, SEXUAL INTERCOURSE. (62:38-63:41) EVE IN CAR. FRANK TELLS EVE TO GET RID OF HER HANGUPS. (63:45-67:21) SCENES ALTERNATE BETWEEN PARTY SCENES AND EVE PERFORMING FELLATIO AND EVE AT HOME.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 13 OF 15 PARTS
(67:25-68:05) EVE COLLAPSES ON BED. FRANK IS DISGUSTED. (68:09-70:16) FRANK GOES TO STATION TO WORK. EVE ACCEPTS PHONE INVITATION TO GROUP SEX PARTY. (70:21-73:14) SEX PARTY - FEMALE PERFORMING FELLATIO. CUNNILINGUS PERFORMED ON EVE. LESBIANISM. SEXUAL INTERCOURSE.

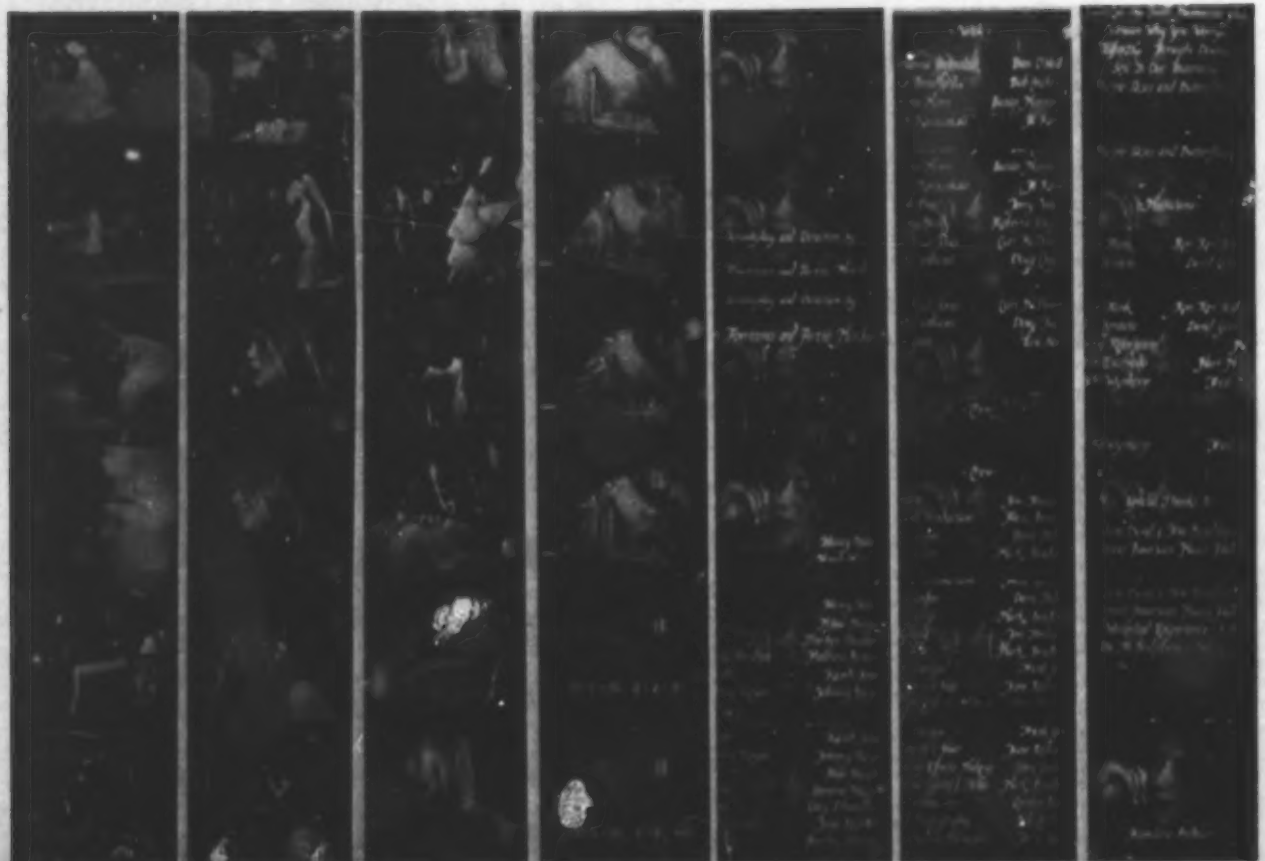
"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 14 OF 15 PARTS
(73:17-73:28) GROUP SEX ORGY. (73:32-73:39) PENIS EJACULATES IN MOUTH OF FEMALE. (73:43-73:59) GROUP SEX CLOSEUP OF SEMEN EJACULATING FROM MALE PENIS. (74:02-75:00) PARTY SCENE. (75:04-76:25) SEX ORGY PARTY. FELLATIO. SEXUAL INTERCOURSE. (76:28-79:06) EVE IS DISROBED BY BLACK FIGHTER. HE FONDLES HER BREASTS. EVE MOUNTS FIGHTER IN SEXUAL INTERCOURSE WHILE HE IS SEATED.

"RESURRECTION OF EVE": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 24595) WAS ISSUED THE REGISTER OF COPYRIGHTS TO ANATUNA, INC. (DATE OF ISSUANCE: NOV. 10, 1973).





"RESURRECTION OF EVE"
PART 15 OF 15 PARTS
(79:10-82:06) SEXUAL INTERCOURSE, FELLATIO, SEXUAL ORGY. (82:10-84:15) CREDITS.

APPENDIX D

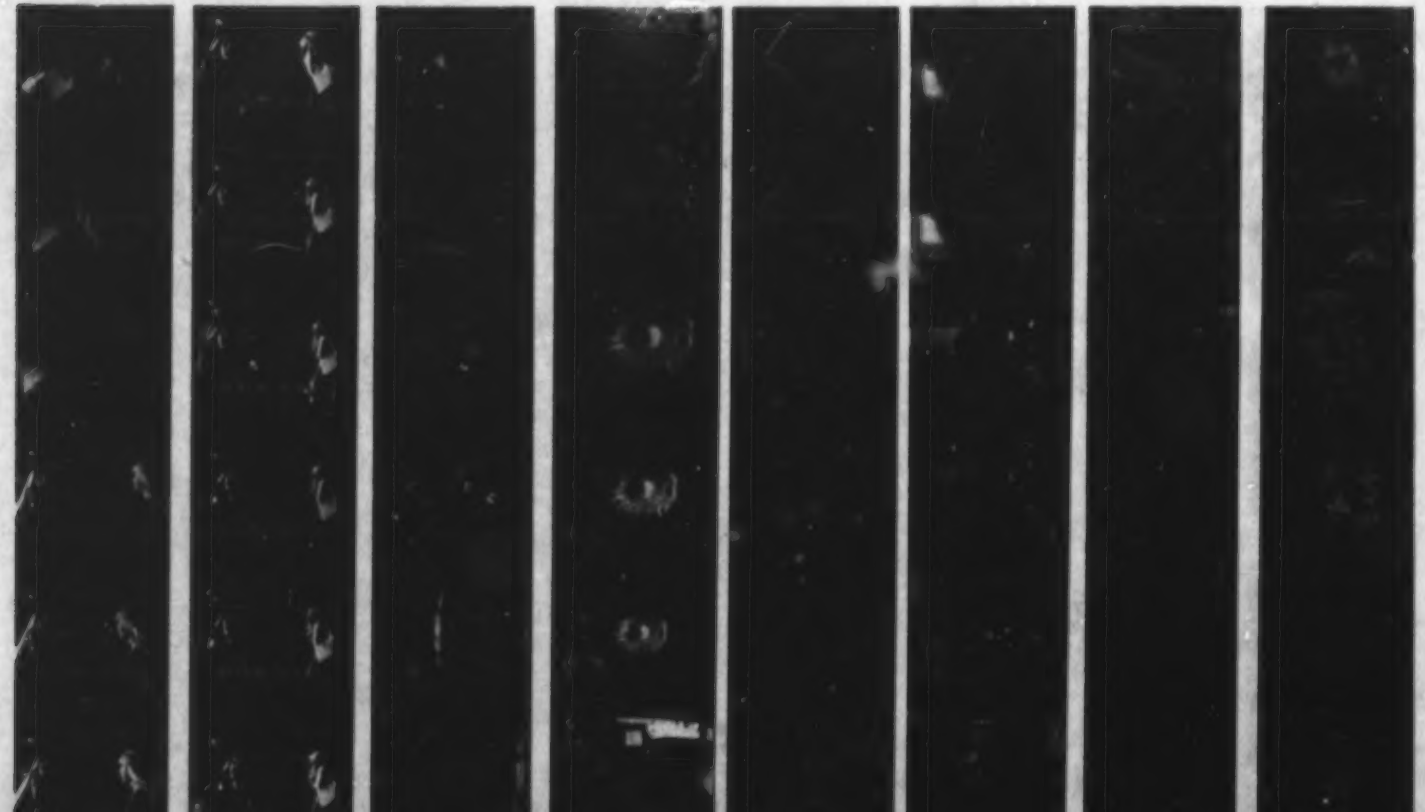
TIME-MOTION STUDY* OF THE FILM

"SODOM AND GOMORRAH"

The motion picture film "Sodom and Gomorrah" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 14, 1975.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

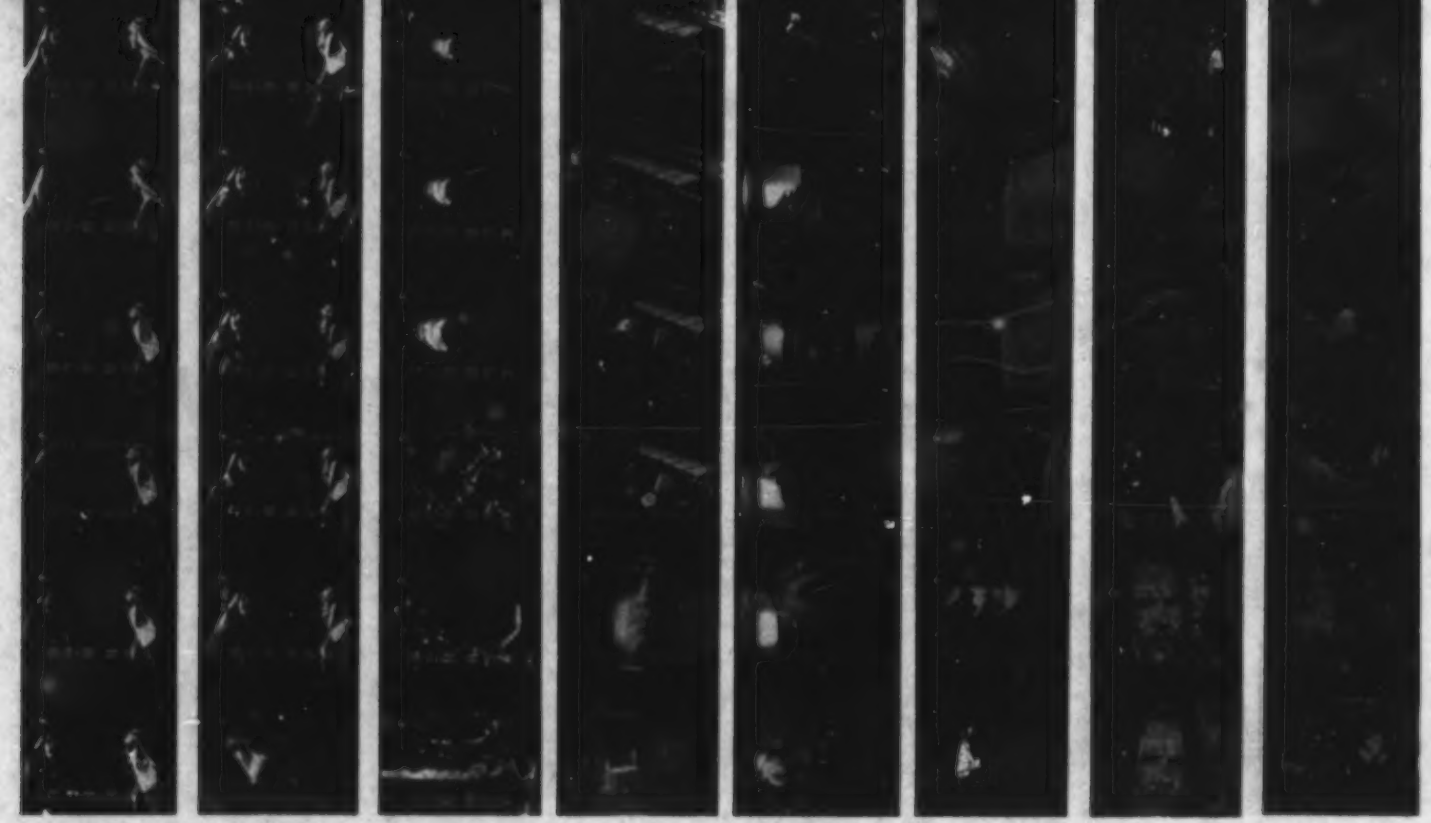




"SODOM AND GOMORRAH"
PART 1 OF 18 PARTS
(00:01-01:33) TITLE, "SODOM AND GOMORRAH" AND FACE OF NARRATOR. (01:36-03:12) MALE CHASING FEMALE, CATCHES HER, AND FORCES HER TO PERFORM FELLATIO. (03:15-03:40) FELLATIO. (03:47-04:19) FRIENDS OF FEMALE KILL MALE. (04:22-05:36) LOT AND PART OF FAMILY TO TALK TO STRANGERS.

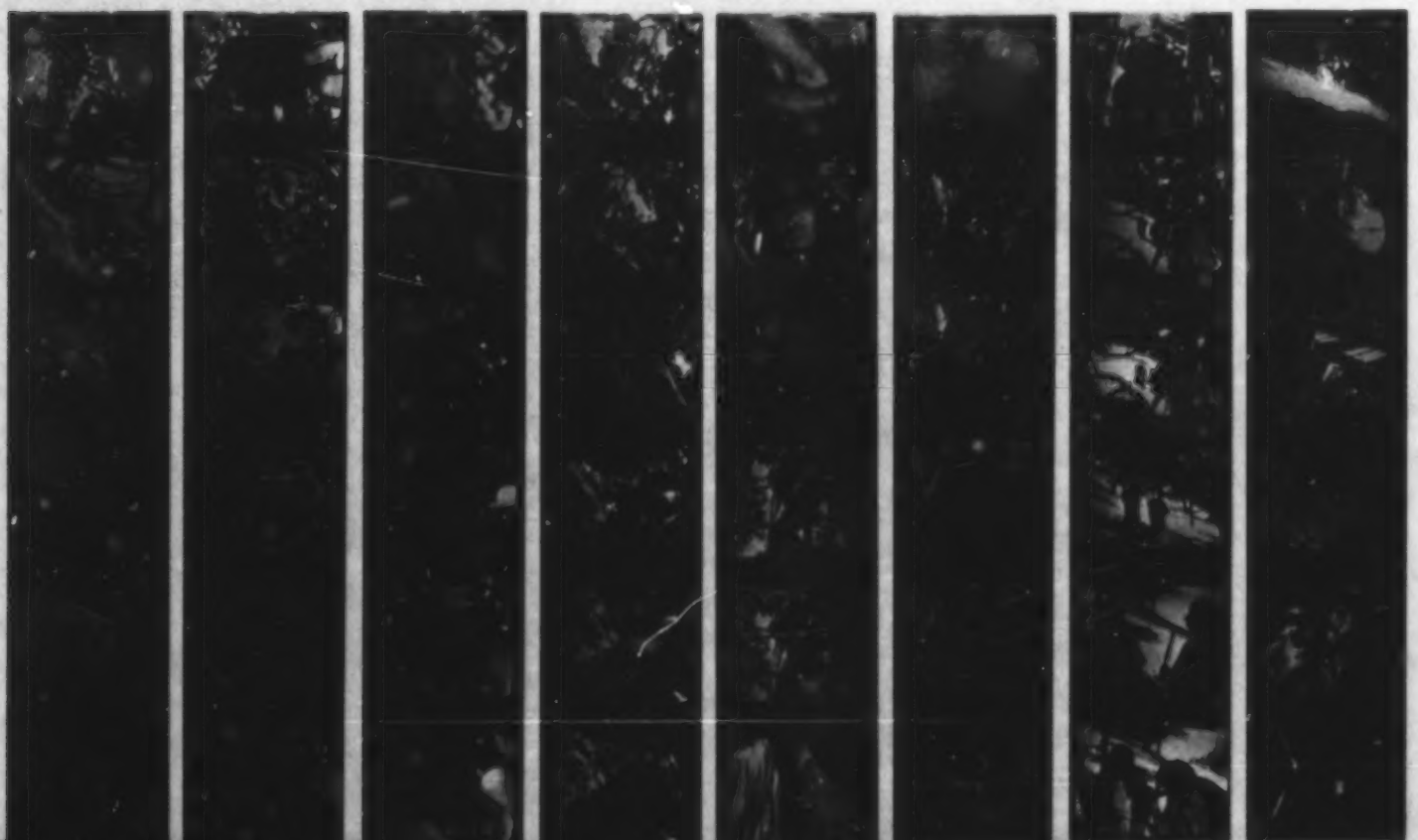
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

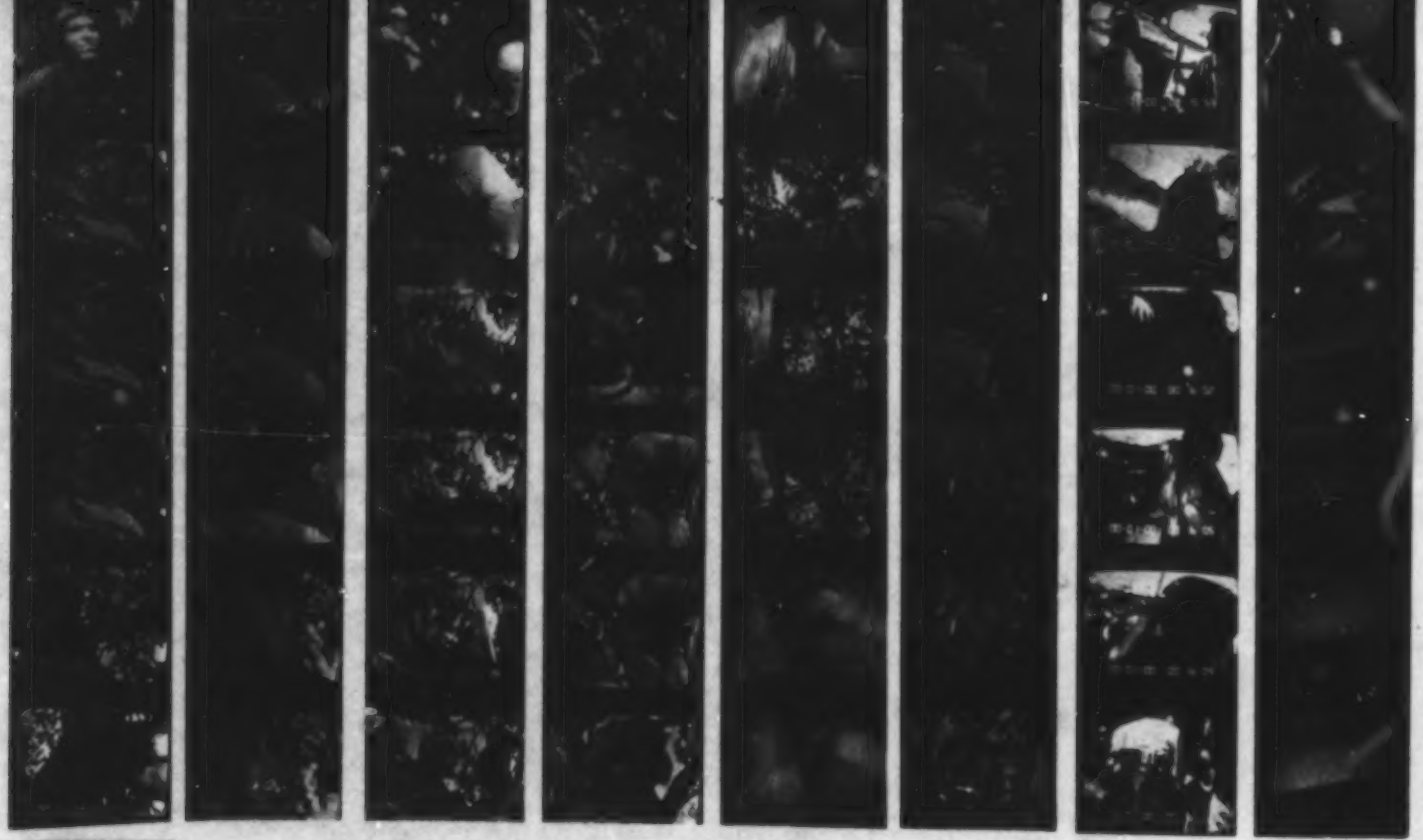




"SODOM AND GOMORRAH"
PART 2 OF 18 PARTS
(05:40-07:05) LOT AND FAMILY DISCUSS MOVING. (07:08-08:47) SPACE SHOTS. INSIDE A SPACE SHIP A MONKEY DRESSED IN A CAPE AND HAT IS APPARENTLY TUNING IN ON LOT'S CONVERSATION. THE MONKEY'S VOICE HAS A "JOHN WAYNE" ACCENT (08:51-11:16) LOT AND FAMILY. MALE MEETS ONE OF LOT'S DAUGHTERS. THEY GO OFF INTO THE HILLS AND CLIMB A TREE

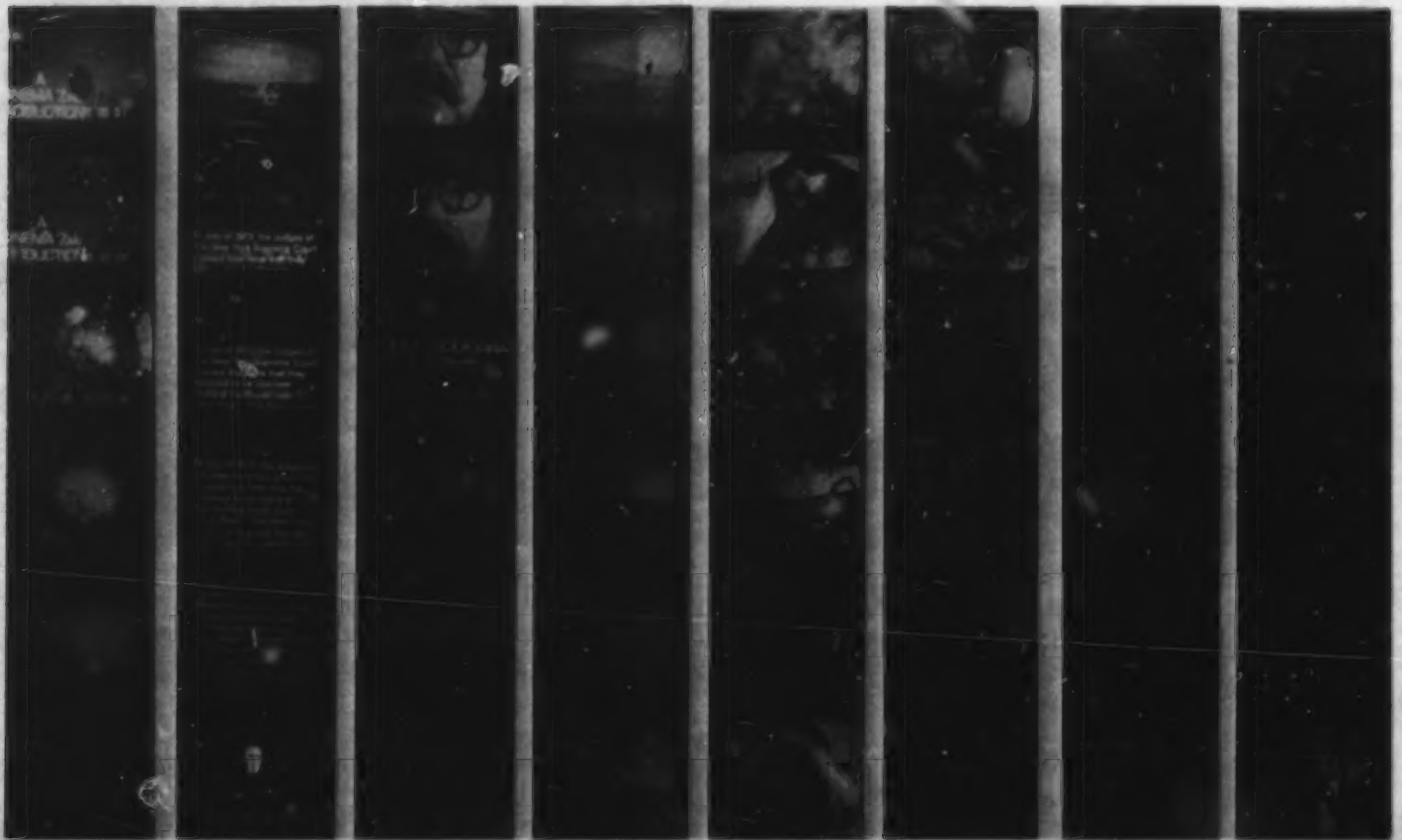
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 3 OF 18 PARTS
(11:19-12:19) MALE AND FEMALE IN TREE. (12:23-13:16) MALE ENGAGES IN CUNNILINGUS WITH FEMALE. (13:19-14:02) MALE AND FEMALE DISCUSS THAT NORMAL INTERCOURSE IS AGAINST THE LAW. (14:05-15:33) COUPLE ENGAGES IN SODOMY IN A TREE. (15:37-16:12) MALE REMOVES PENIS FROM FEMALE'S ANUS AND EJACULATES. EJACULATION FALLS ON THE FACE OF LOT WHO IS UNDER THE TREE. (16:15-16:41) SCENE SHIFT TO SPACE SHIP AND MONKEY. (16:44-16:55) LOT GOES OFF ALONE TO PRAY.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 4 OF 18 PARTS
(16:58-17:37) LOT PRAYS. (17:41-22:08) A MALE AND FEMALE MEET, TALK, AND THEN ENGAGE IN SEXUAL INTERCOURSE UNDER TREE. MALE WITH LONG BEARD AND STAFF APPROACHES MALE AND FEMALE UNDER TREE. (22:12-22:39) MALE WITH BEARD MASTURBATES AND FELLATES HIMSELF.

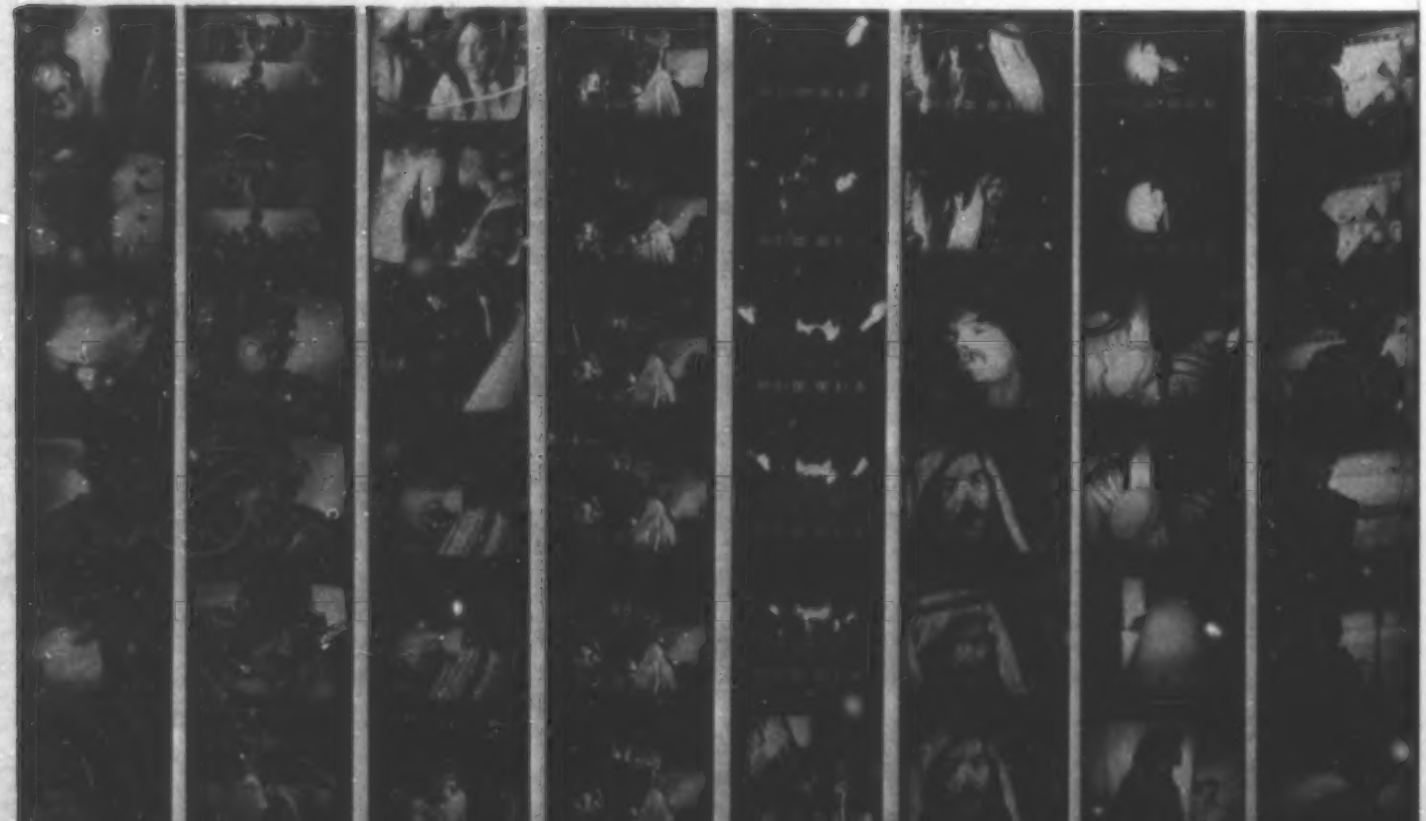
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS"; CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 5 OF 18 PARTS
(22:40-23:49) MALE WITH BEARD CONTINUES TO MASTURBATE WHILE WATCHING COUPLE ENGAGED IN INTERCOURSE. (23:54-24:38) SCENE SHIFTS. LOT AND HIS FAMILY ARRIVE IN SODOM. THEY WATCH SLAVE BUYING SCENE WHERE FEMALES ARE PUT ON AUCTION AND SOLD. (24:42-24:45) CUSTOMER INSPECTS FEMALE VAGINAL AREA. (24:49-26:28) SCENES OF SLAVE MARKET. (26:31-27:07) KING OF SODOM. (27:10-28:11) LOT AND FAMILY TALKING IN FRONT OF THE KING OF SODOM, AS SLAVE AUCTION CONTINUES.

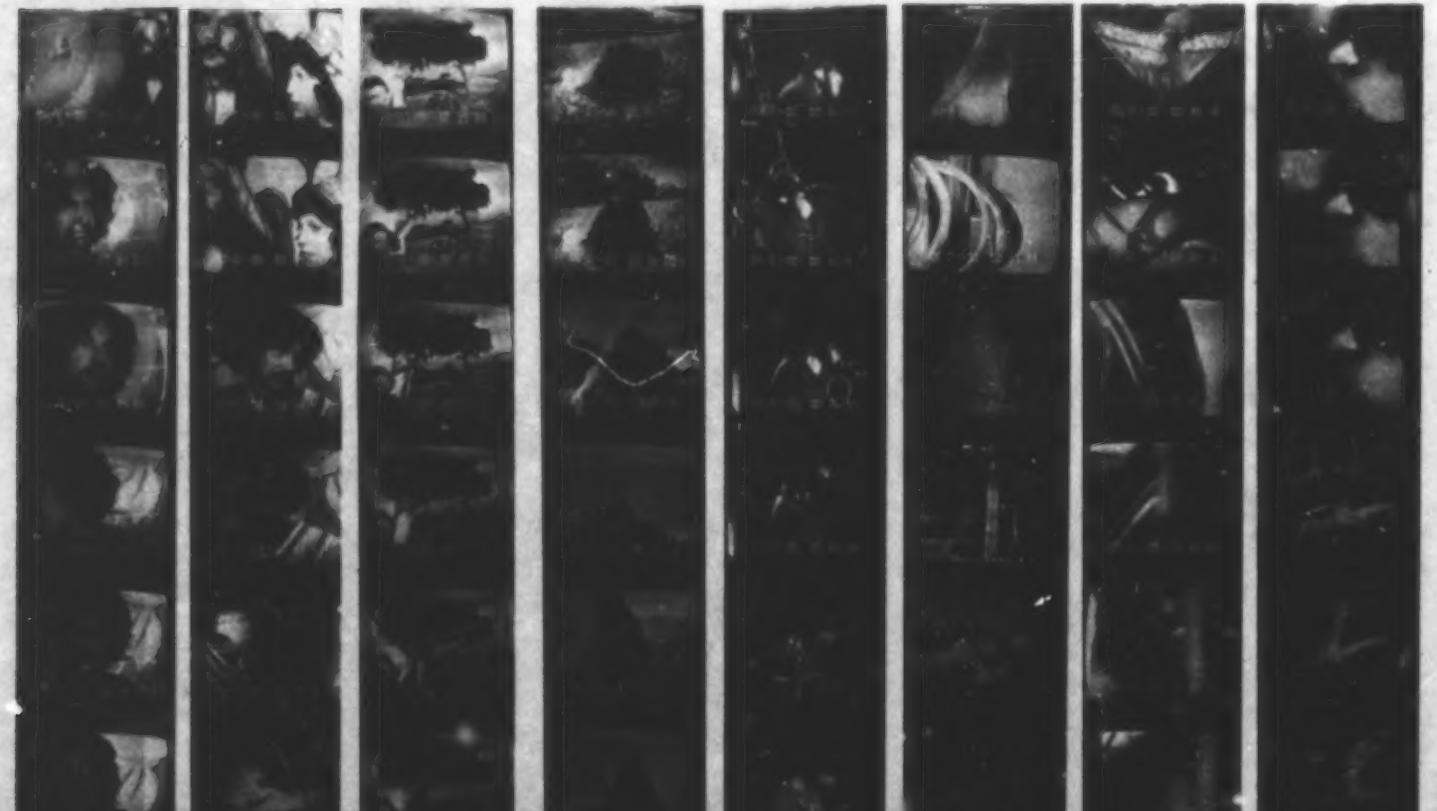
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

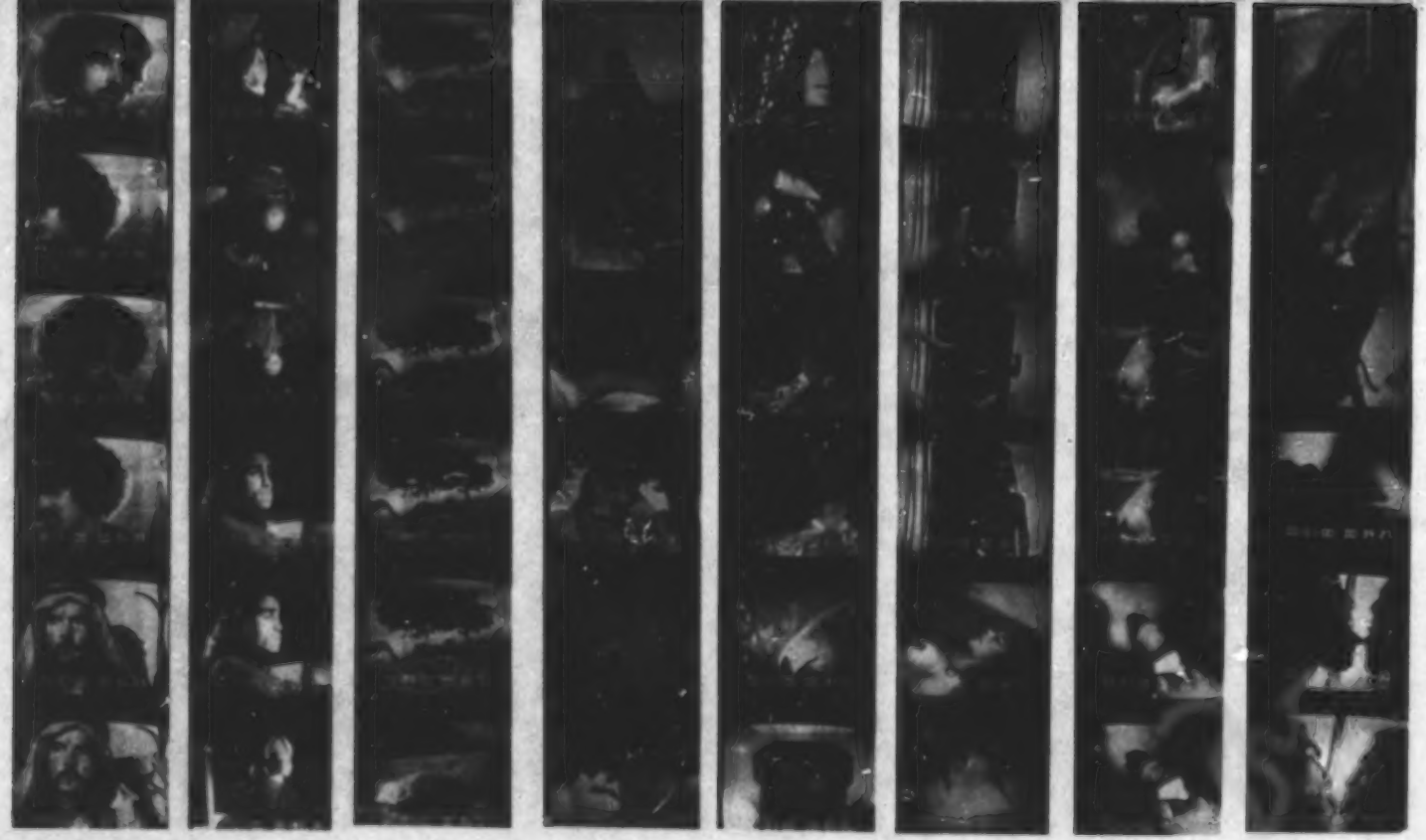




"SODOM AND GOMORRAH"
PART 6 OF 18 PARTS
(28:17-28:49) GENITALS ARE SHOWN. FEMALE LICKS FINGERS. (28:53-33:54) KING OF SODOM TALKS WITH LOT AND HIS WIFE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 7 OF 18 PARTS
(33:58-34:54) KING OF SODOM CONTINUES TALKING WITH LOT. (34:58-39:34) SPACE SHIP INTERIOR SHOW MONKEY AND MALE ASSISTANT DRESSED IN BATHING SUIT AND CAPE. LOT GOES OFF TO PRAY AGAIN. SCENE SWITCHES TO MALE IN SPACE SHIP. HE ENTERS ROOM WHERE NUDE FEMALE RESTS IN GLASS CASE. MALE PRESSES AGAINST AGAINST CASE AND BEGINS TO MASTURBATE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 8 OF 18 PARTS
(39:37-41:52) MALE MASTURBATES AGAINST CASE, EJACULATES INTO TUBE. (41:55-42:20) MALE THEN TALKS WITH MOOSE HANGING ON WALL. (42:23-45:13) MALE FROM SPACE SHIP SHOWN ON EARTH DRESSED IN BIBLICAL CLOTHES TALKING WITH ONE OF LOT'S DAUGHTERS.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 9 OF 18 PARTS
(45:17-45:34) SPACE SHIP MALE NOW DRESSED IN EARTH CLOTHES TALKS WITH DAUGHTERS. (45:39-45:49) LOT AND HIS WIFE SELLING THINGS AT A STORE THEY HAVE SET UP IN SODOM. (45:52-46:13) A MALE GOES IN BACK SECTION OF TENT WITH LOT'S WIFE. MALE PLACES CUCUMBER IN THE VAGINA OF LOT'S WIFE, THEN PLACES CUCUMBER IN HIS MOUTH. (46:17-48:03) MALE AND LOT'S WIFE CONTINUE WITH CUCUMBER. (48:07-48:45) LOT AND WIFE AND OTHER PEOPLE TALKING. (48:49-50:53) KING OF SODOM TALKS TO THE PEOPLE.

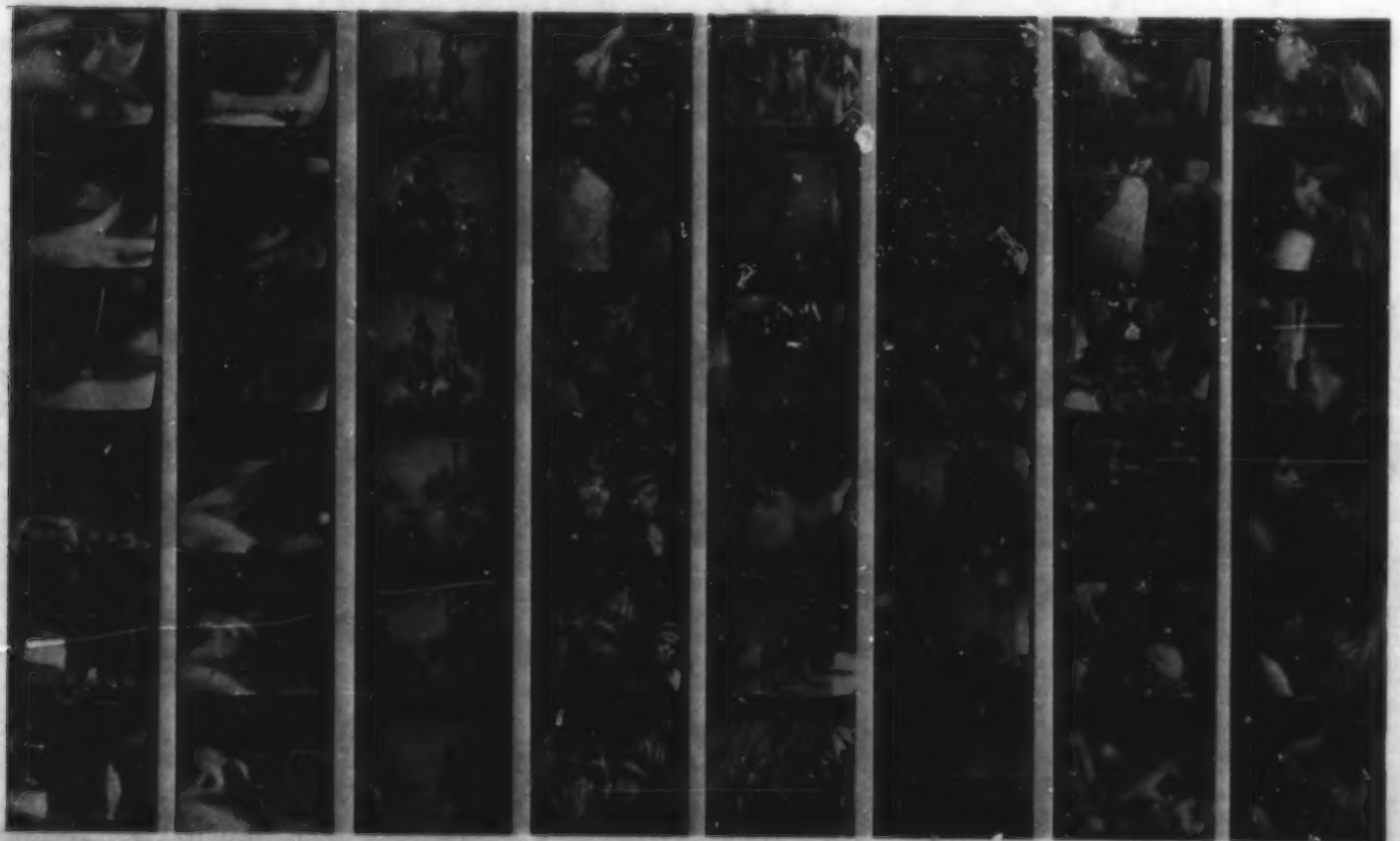
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"SODOM AND GOMORRAH"
PART 10 OF 18 PARTS
(50:56-51:35) PEOPLE SPEAK WITH KING OF SODOM. (51:39-52:25) A MALE PLACES PIECE OF CHICKEN AGAINST VAGINA OF FEMALE AND THEN EATS CHICKEN. (52:28-54:43) PEOPLE CONTINUE TALKING. (54:46-56:32) FEMALES ENGAGE IN LESBIAN-TYPE KISSING OF BREASTS.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 11 OF 18 PARTS
(56:35-57:43) LESBIANISM CONTINUES AND KING OF SODOM KISSES A FEMALE NEAR THE VAGINA AREA. (57:47-57:50) KING OF SODOM. (57:54-101:30) OUTDOOR SCENES - MARKET PLACE. PEOPLE EATING AND DRINKING. (101:33-102:01) FELLATIO. (102:05-102:13) FEMALES LAUGHING.

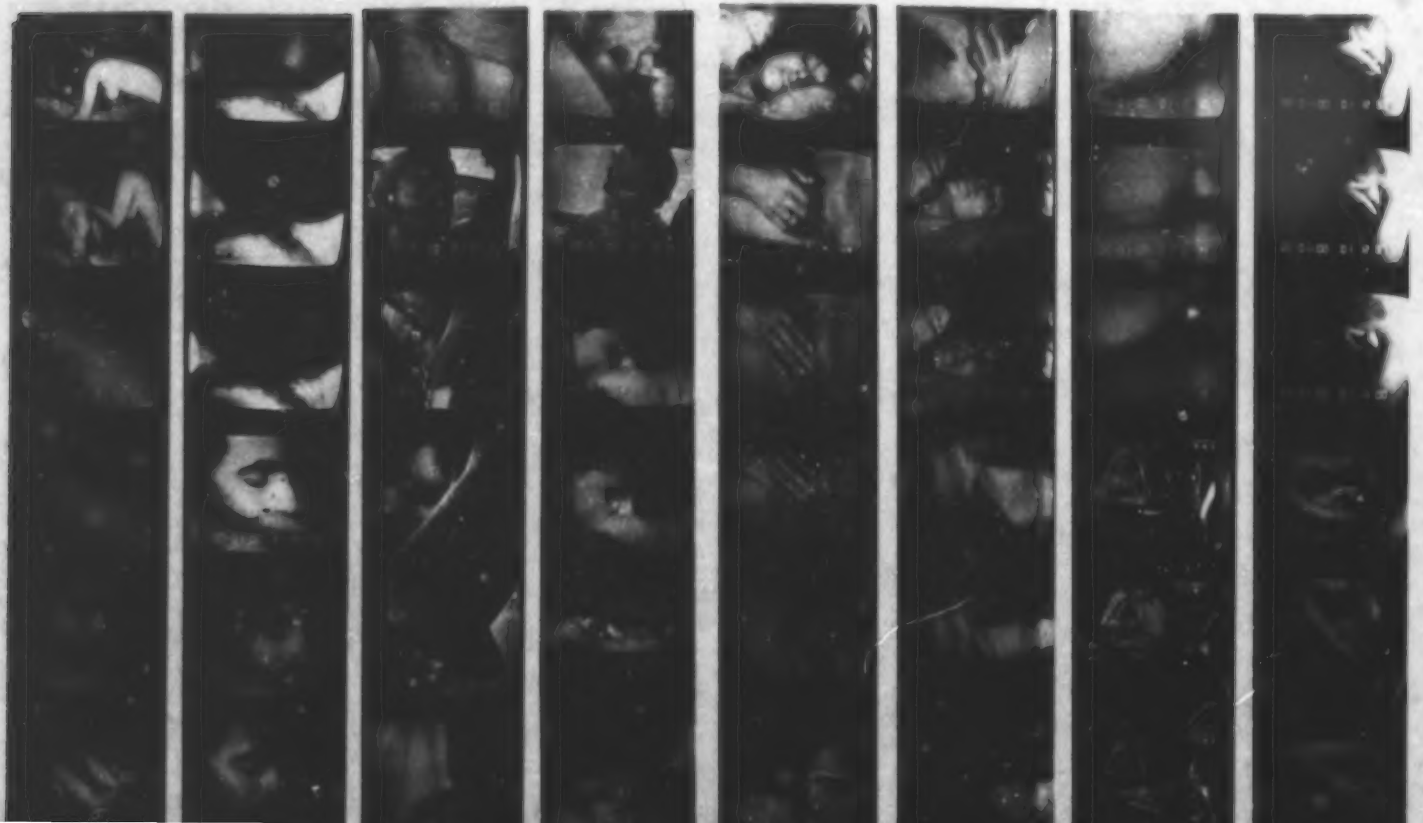
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 12 OF 18 PARTS
(1:02:16-1:02:33) FELLATIO. (1:02:44-1:03:05) MALE PLACES BANANA IN FEMALE'S VAGINA, THEN PLACES BANANA IN HER MOUTH. (1:03:09-1:03:51) FELLATIO. (1:03:55-1:04:09) ANALINGUS. (1:04:12) FELLATIO. (1:04:16-1:07:52) CUNNILINGUS, FELLATIO, SEXUAL ORGY.

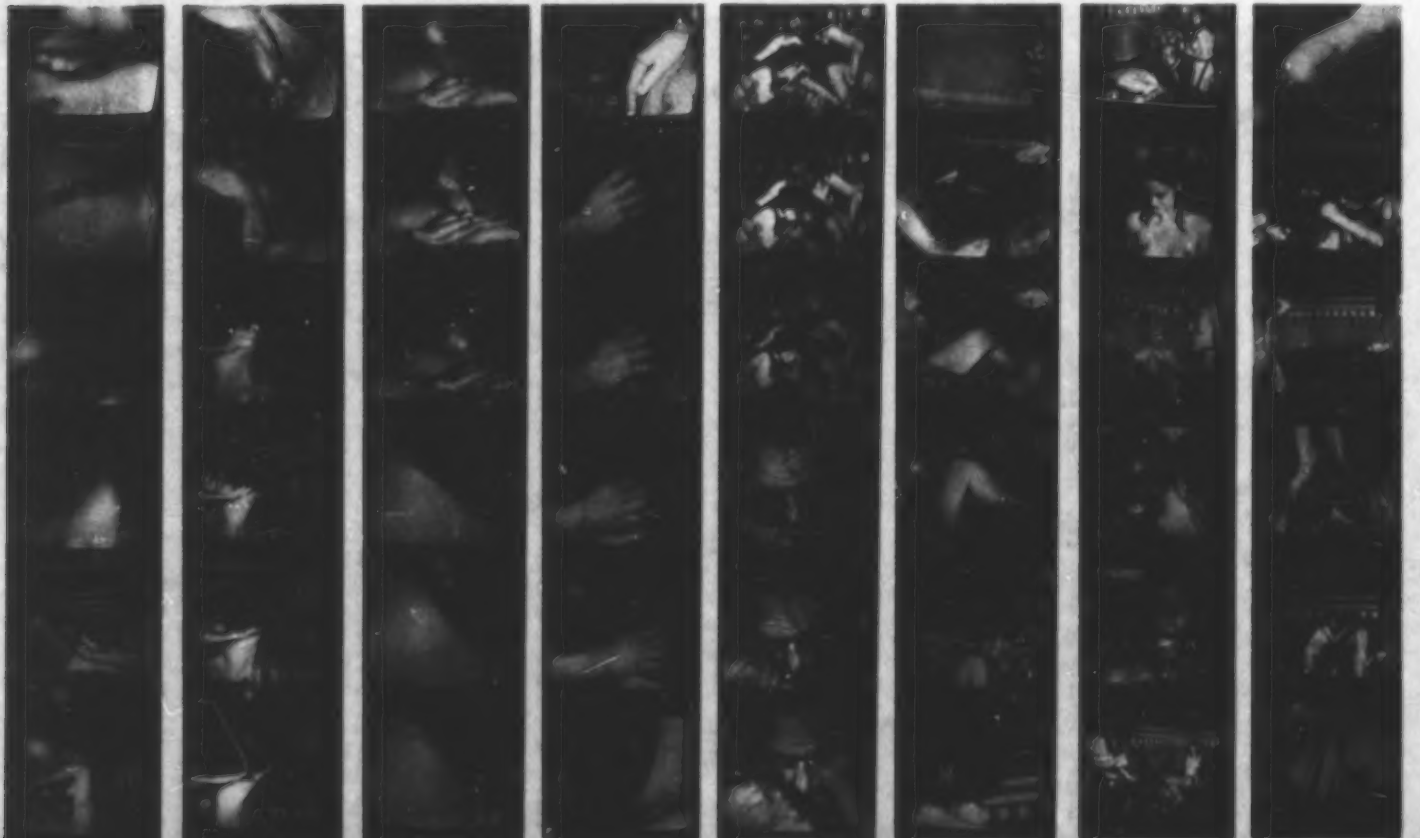
"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 13 OF 18 PARTS
(1D7:55-123:32) SEXUAL ORGY CONTINUES. CUNNILINGUS, SEXUAL INTERCOURSE, MASTURBATION, EJACULATION INTO A GOLD CUP, LESBIANISM.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).

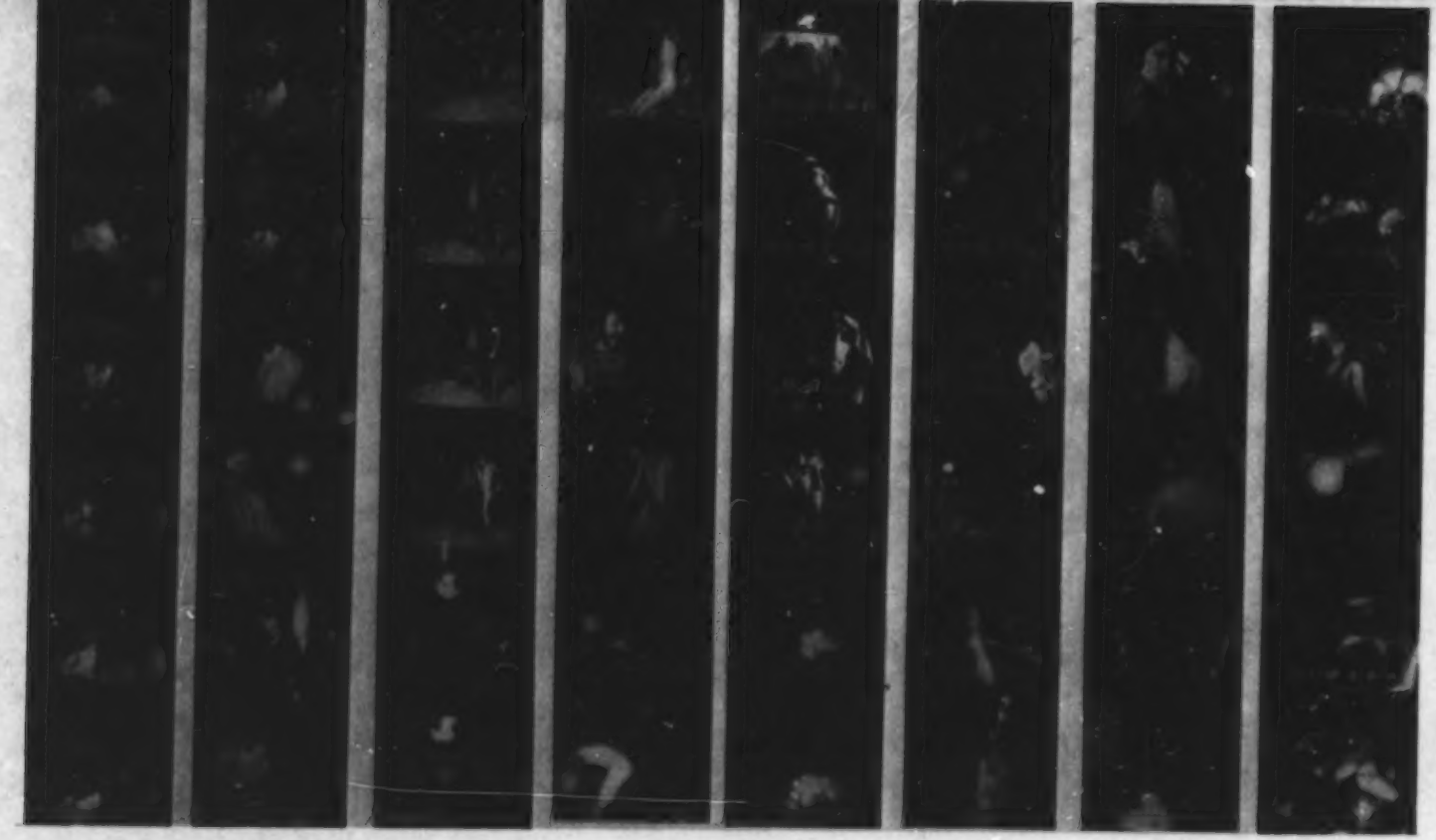




"SODOM AND GOMORRAH"
PART 14 OF 18 PARTS
(1:13:36-1:19:12) SEXUAL ORGY CONTINUES. CUNNILINGUS, MASTURBATION, TWO FEMALES FELLATE PENIS, BLACK MALE SODOMIZES WHITE MALE WITH CUCUMBER. SCENE SHIFT TO OUTDOORS. MALE MASTURBATES NEAR DONKEY WHICH RUNS AWAY.

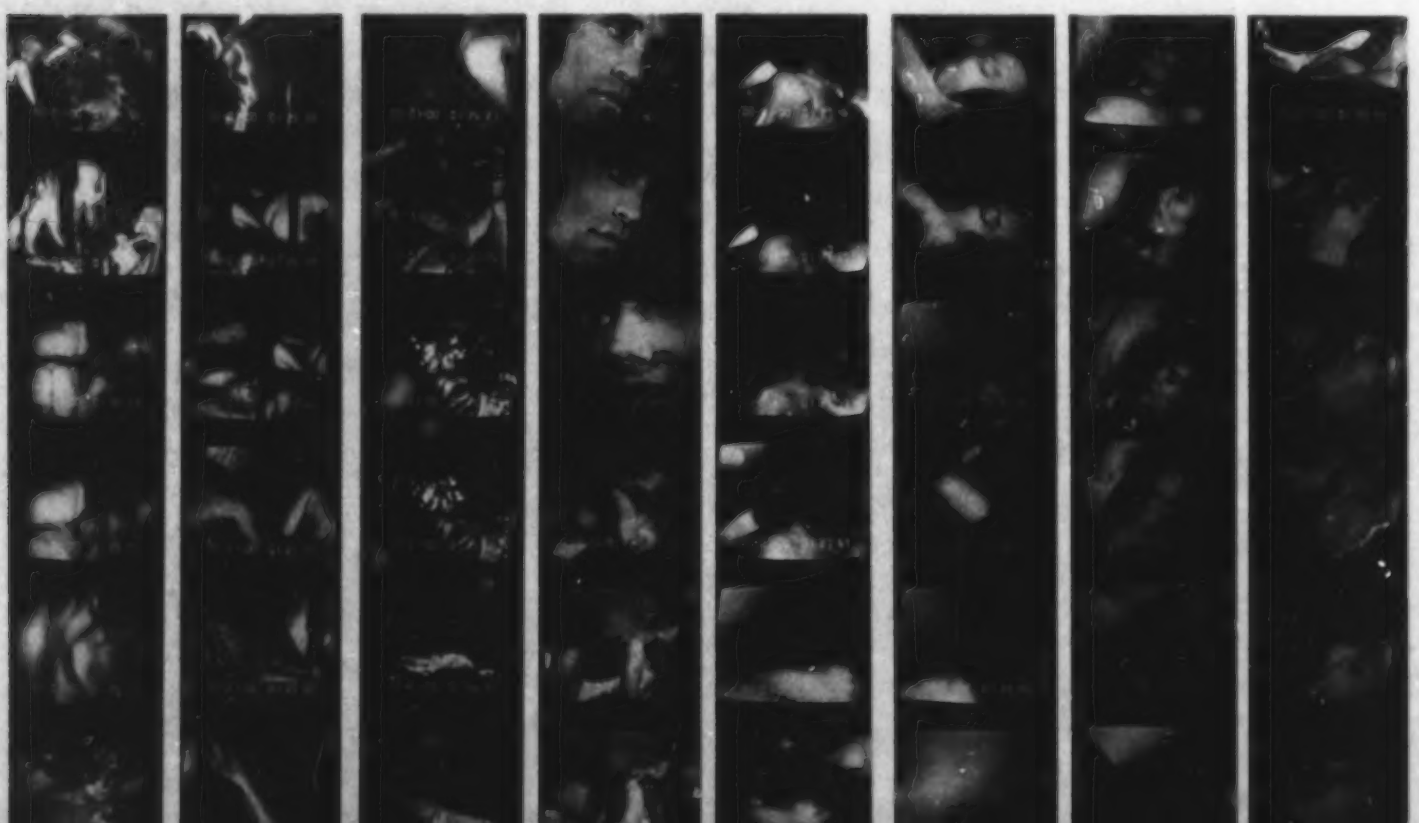
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"SODOM AND GOMORRAH"
PART 15 OF 18 PARTS
(119:16-124:52) GROUP OF MALES AND FEMALES BY FIRE. MAN FROM SPACE SHIP FIGHTS WITH LONG-HAIRED, SHAGGY EARTHLING. THEY HAVE FIGHT AROUND FIRE.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 16 OF 18 PARTS
(1:24:56-1:24:59) SPACE MAN WINS FIGHT. (1:25:03-1:30:33) VARIOUS PEOPLE TALKING - SEXUAL ACTIVITY BETWEEN GROUPS OF MALES AND FEMALES. FELLATIO, CUNNILINGUS, SEXUAL INTERCOURSE.

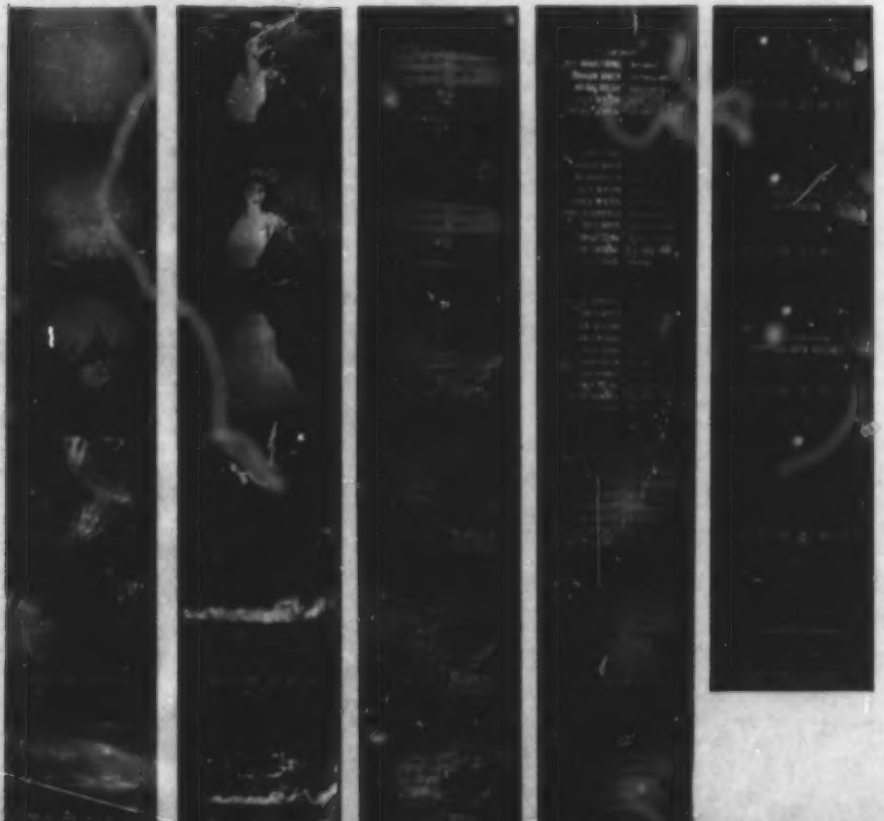
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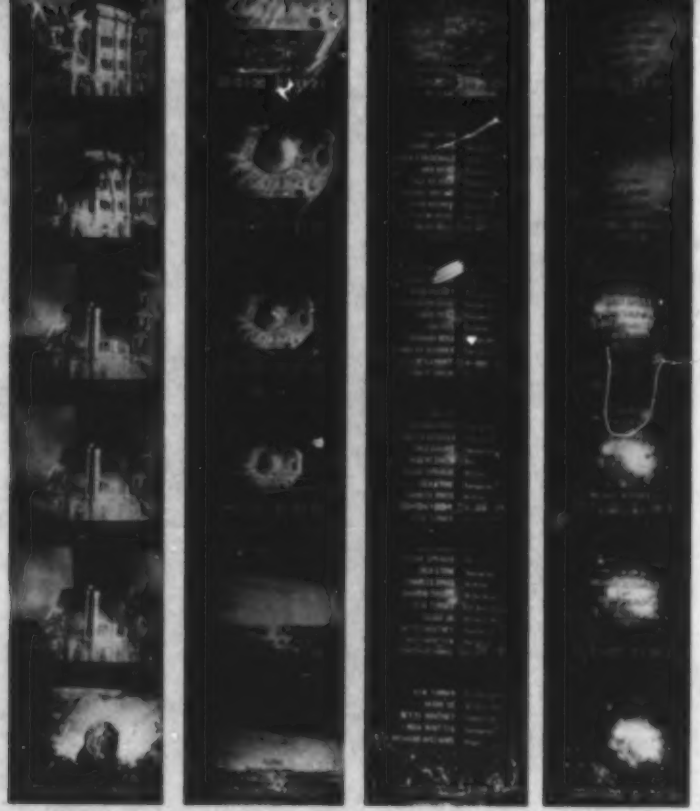




"SODOM AND GOMORRAH"
PART 17 OF 18 PARTS
(Ⅱ30:36-Ⅱ33:20) KING OF SODOM IN SEXUAL INTERCOURSE. (Ⅱ33:23-Ⅱ36:14) SCENE SHIFTS OUTDOORS. LOT AND FAMILY LEAVE SODOM. FEMALE TALKS TO SPACEMAN. SPACE MONKEY IN SPACESHIP DECIDES TO DESTROY SODOM.

"SODOM AND GOMORRAH - THE LAST SEVEN DAYS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 45011) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 14, 1975).





"SODOM AND GOMORRAH"
PART 10 OF 10 PARTS
(1:36:17-1:36:56) SCENES OF SODOM BLOWN UP BY A BOMB. (1:37:00-1:39:22) LOT'S WIFE LOOKS BACK AND TURNS TO SALT. SPACE SHIP SHOWN GOING OFF IN SPACE AS CREDITS APPEAR AND FEATURE ENDS.

APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"THE AUTOBIOGRAPHY OF A FLEA"

The motion picture film "The Autobiography of a Flea" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Oct. 12, 1976.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

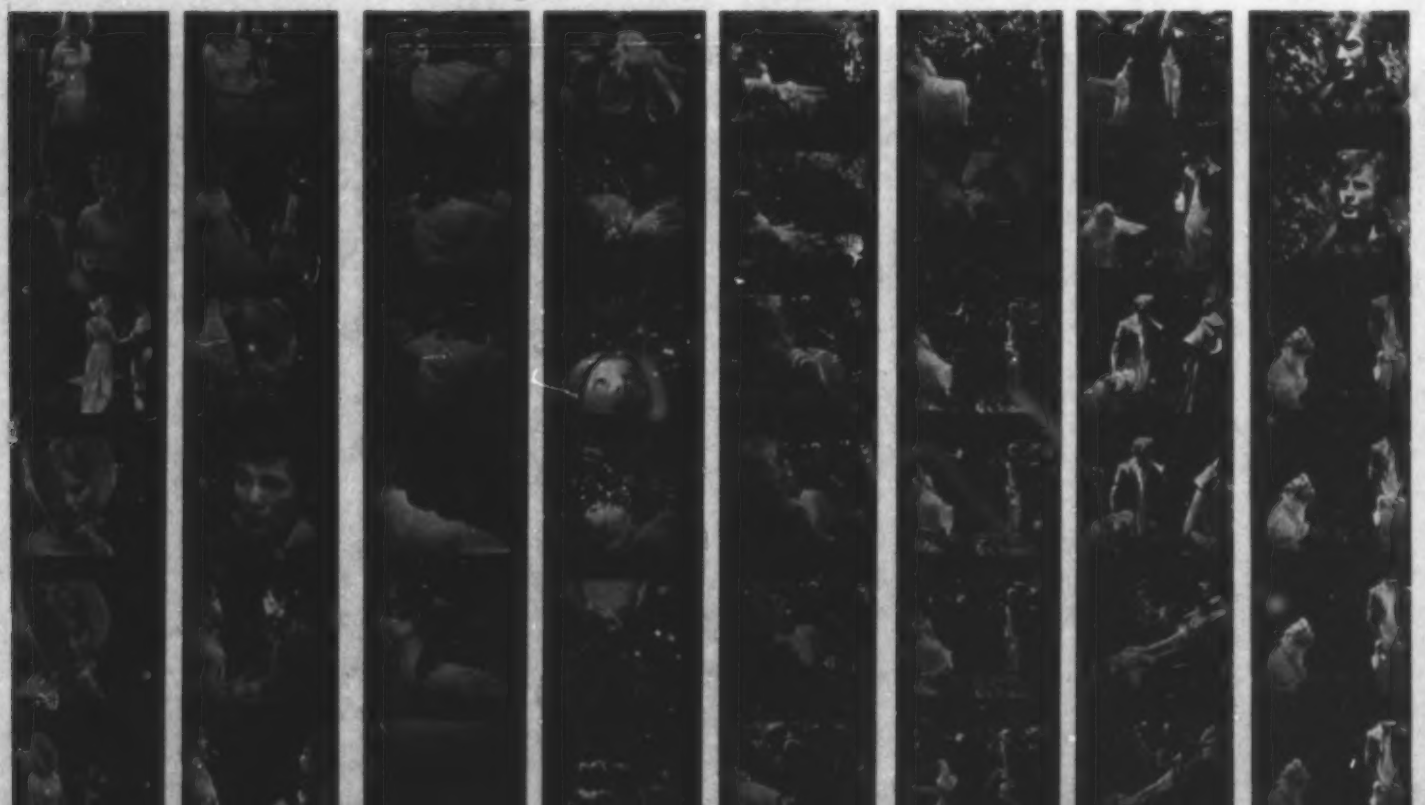
"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 1 OF 17 PARTS
(00:05-01:22) PRESENT THE TITLE AND A SHORT INTRODUCTION. AN UNSEEN FLEA NARRATES ON AND OFF THROUGHOUT THE FILM. THE FLEA HAS MADE HIS HOME IN THE VAGINA OF A 14 YEAR OLD GIRL. THE SETTING IS IN OLD FRANCE AROUND THE SEVENTEEN HUNDRED'S. (01:26-04:37) DEPICT THE 14 YEAR OLD EXAMINING HER BODY. THE NARRATOR FLEA INDICATES THAT THE FEMALE IS A VIRGIN. (04:41-05:32) DEPICT THE 14 YEAR OLD FEMALE AND THE MOTHER IN CHURCH AND A YOUNG MALE SITTING IN A PEW. THEN SCENE SHIFTS OUTSIDE.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 2 OF 17 PARTS
(05:40-06:53) DEPICT THE YOUNG GIRL AND THE MOTHER LEAVING CHURCH AND THE YOUNG MAN PASSING HER A NOTE WHICH SAID MEET HER IN THE GARDEN. THE YOUNG MALE AND FEMALE ARE IN THE GARDEN. (06:57-08:10) THEY ENGAGE IN AN ACT OF SEXUAL INTERCOURSE ON A BENCH. THE NARRATOR INDICATES THAT THIS IS THE FIRST EXPERIENCE FOR BOTH. (08:14-10:22) A MONK HIDING IN THE BUSHES CATCHES THE PAIR AND CHASTIZES THEM. (10:26-10:54) THE MONK TELLS THE YOUNG FEMALE THAT SHE MUST VISIT HIS QUARTERS WHERE HE WILL ASSIST HER IN GETTING RID OF THIS PARTICULAR SIN. (10:57-11:11) DEPICT THE FEMALE VISITING THE MONK'S QUARTERS.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

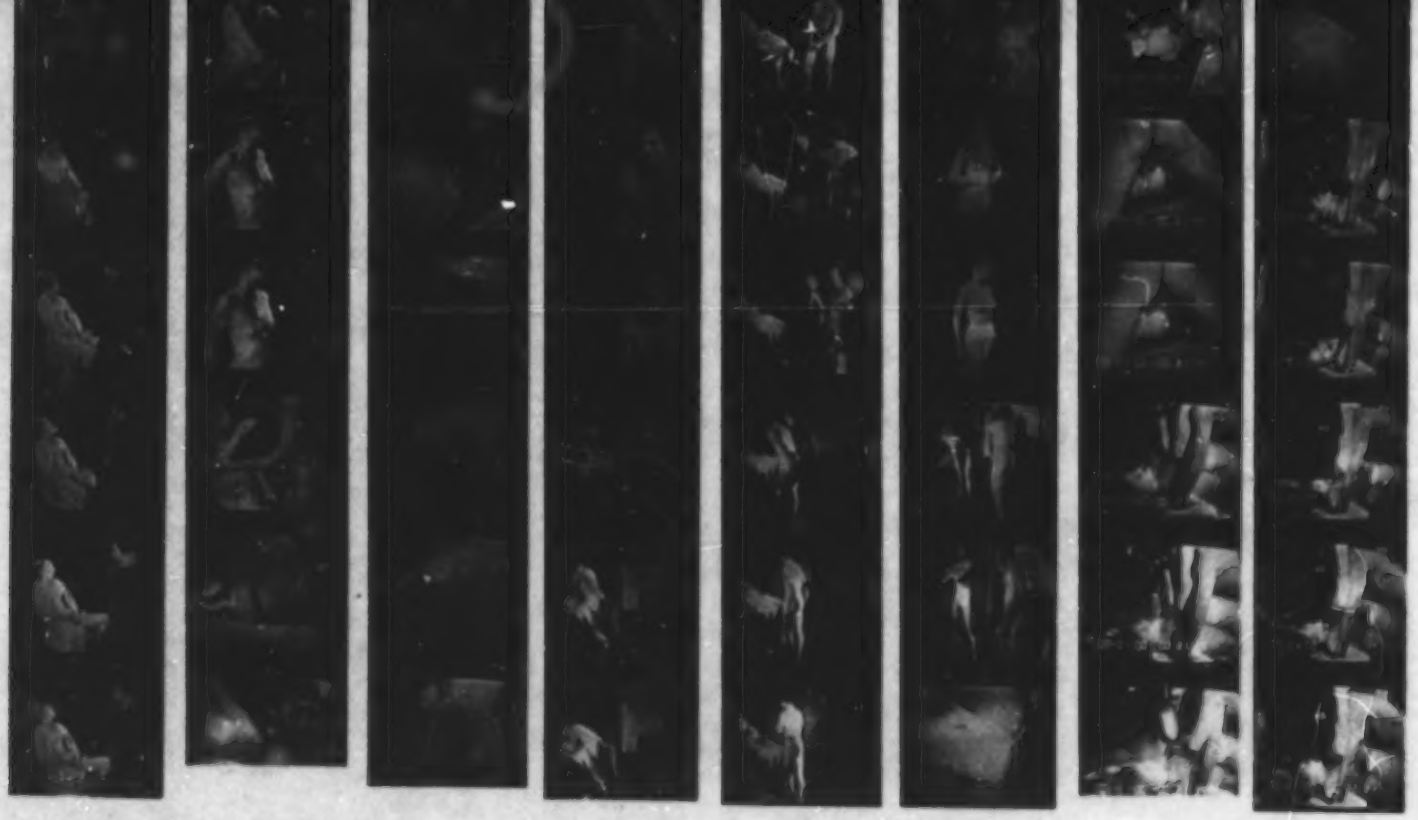




"THE AUTOBIOGRAPHY OF A FLEA"
PART 3 OF 17 PARTS
(11:15-13:48) THE MONK TELLS HER SHE MUST DO EVERYTHING HE SAYS SO SHE WILL BE SAVED. (13:52-13:55) HE KISSES THE 14 YEAR OLD FEMALE. (13:59-15:33) THE MONK ENGAGING IN CUNNILINGUS WITH THE YOUNG FEMALE, LYING ACROSS THE TABLE. (15:36-16:23) THE MONK TELLS THE YOUNG FEMALE THAT SHE CAN MASTURBATE HIM (NOT IN THOSE PARTICULAR TERMS) SHE BEGINS TO MASTURBATE THE MONK'S PENIS. (16:25-16:46) THE YOUNG FEMALE FELLATES THE MONK.

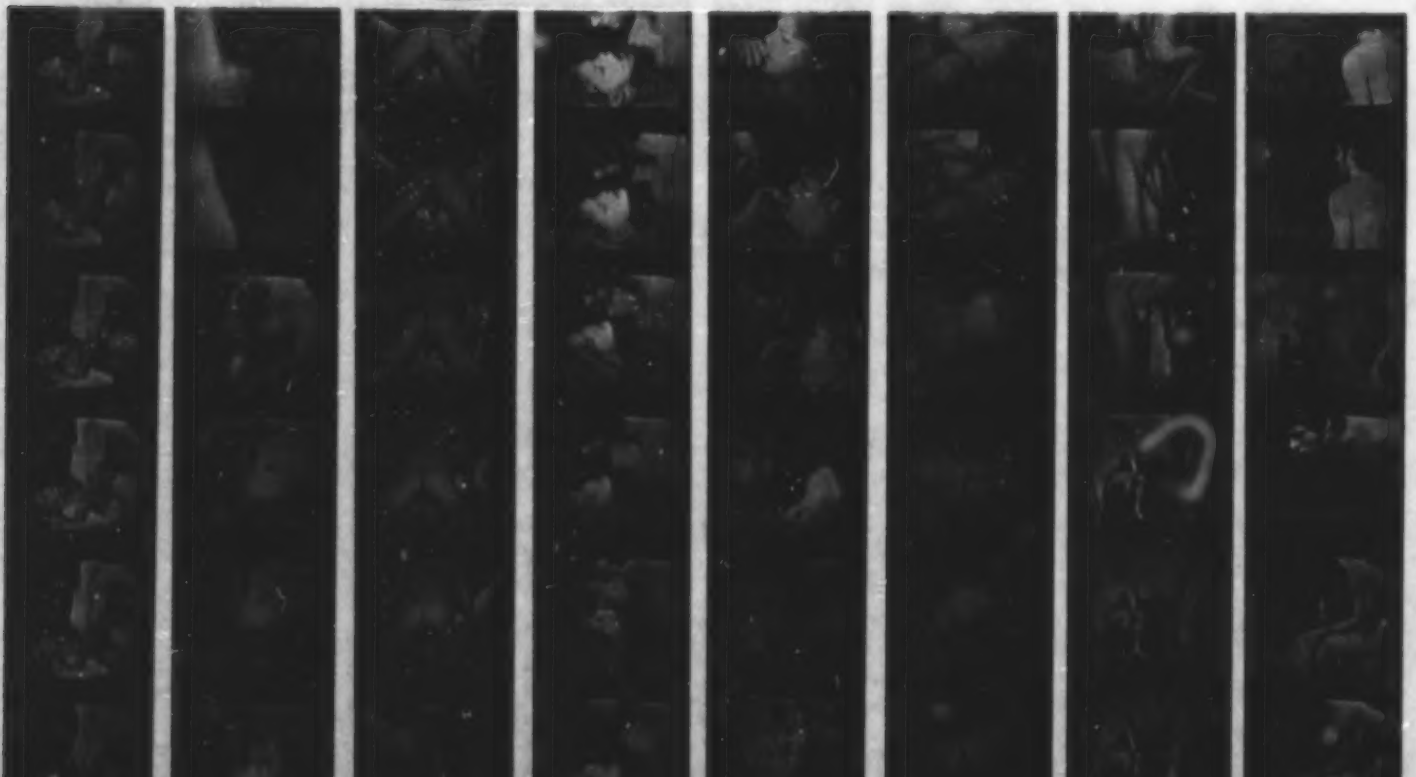
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 4 OF 17 PARTS
(16:49-17:10) FELLATIO CONTINUES. (17:14-18:03) THE YOUNG FEMALE DISROBES. (18:06-19:54) THE MONK ENGAGES IN SEXUAL INTERCOURSE WITH THE YOUNG FEMALE. (19:58-21:07) TWO OTHER MONKS ENTER SAYING "MMM--" ONE OF THE MONKS IS JOHN HOLMES. (21:11-22:21) ANOTHER MONK ENGAGES IN SEXUAL INTERCOURSE WITH THE FEMALE ON THE FLOOR

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 5 OF 17 PARTS
(22:24-24:57) THE SAME MONK CONTINUES TO ENGAGE IN SEXUAL INTERCOURSE WITH THE FEMALE ON THE FLOOR. (25:01-26:31) THE OTHER MONK, WHO IS ACTOR JOHN HOLMES, APPROACHES THE FEMALE AND ENGAGES IN SEXUAL INTERCOURSE WITH HER. (26:35-27:45) THE TWO MONKS, STANDING NUDE, TALK TO EACH OTHER ABOUT THE OCCURRENCE. ONE MONK TELLS THE FEMALE THAT SHE MUST DO OTHER THINGS. (27:48-27:55) THE FEMALE TURNS AND GOES ON HER KNEES ON THE FLOOR WHILE THE OTHER MONK ENGAGES IN SODOMY WITH HER.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 6 OF 17 PARTS
(27:59-28:51) SODOMY CONTINUES. MONKS DISCUSS FEMALE. (28:54-29:40) SCENE SHIFTS TO THE SAME FEMALE IN A ROOM WITH ONE OF THE MONKS AND HER UNCLE. (29:43-31:03) THE UNCLE DECIDES HE WILL HAVE INTERCOURSE WITH HIS NIECE, THE 14 YEAR OLD FEMALE. THE MONK HELPS THE UNCLE HOLD HER WHILE HE ATTEMPTS TO ENGAGE IN SEXUAL INTERCOURSE. (31:07-31:17) THIS POINT THE FLEA BITES THE PENIS OF THE UNCLE WHICH STOPS THE ACTIVITY. THE FEMALE RUNS OUT OF THE ROOM. (31:21-33:30) THE NIECE IS SLEEPING. THE UNCLE COMES INTO THE BEDROOM AND PULLS THE COVERS BACK EXPOSING HER NUDE BODY. SHE THEN RAPES HIM (SUPPOSEDLY) ON THE BED, AND ENGAGES IN SEXUAL INTERCOURSE WITH THE FEMALE SUPERIOR.

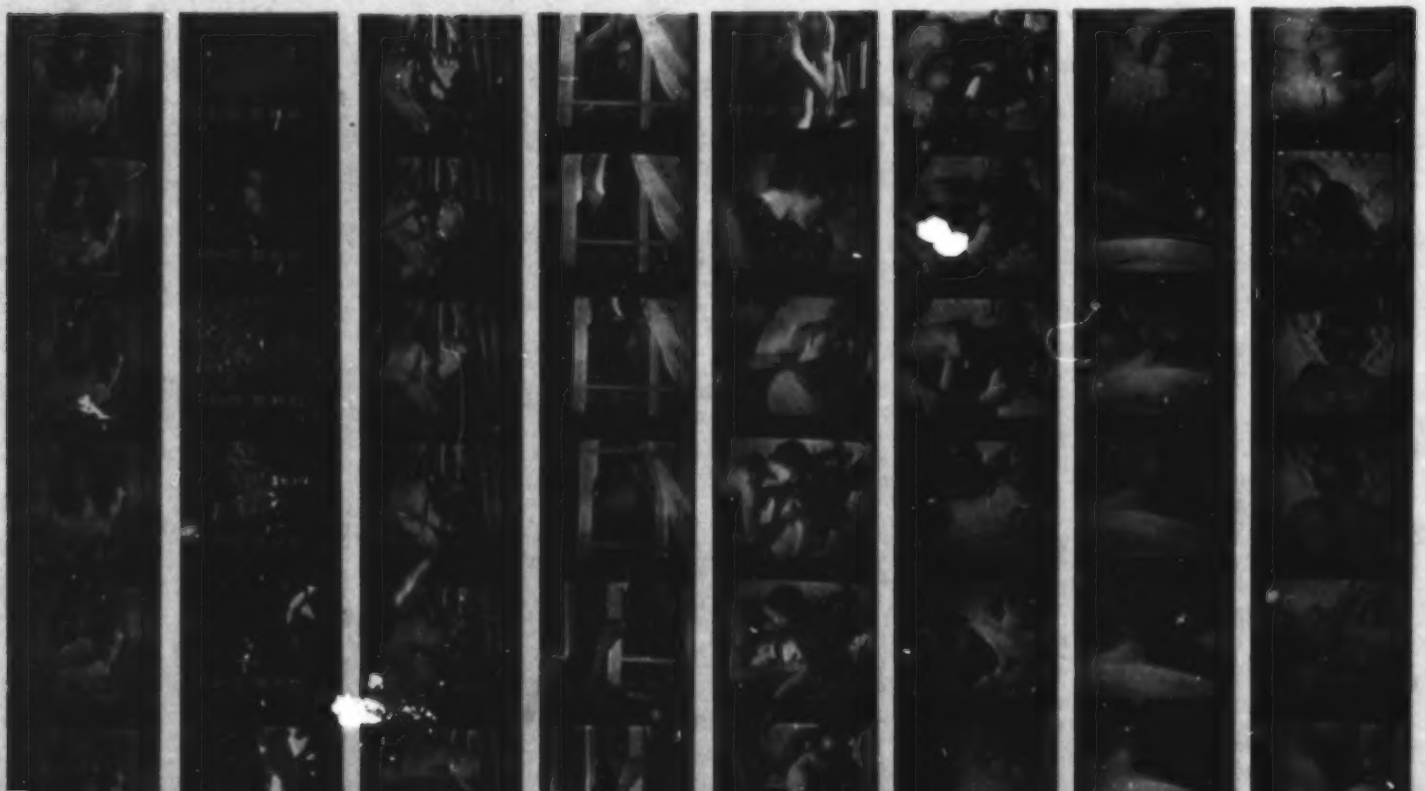
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 7 OF 17 PARTS
(33:33-33:40) INTERCOURSE CONTINUES. (33:44-34:05) THE OUTDOOR SCENE SHOWING TWO YOUNG FEMALES TALKING. ONE OF THE FEMALES IS THE 14 YEAR OLD GIRL, THE OTHER GIRL IS HER FRIEND, WHO IS ALSO SUPPOSEDLY A TEENAGER. (34:09-35:49) THE FRIEND'S FATHER JOINS THEM IN DANCING AND PLAYING ON A LAWN. (35:53-38:47) THE SCENE SHIFTS TO THE ORIGINAL 14 YEAR OLD IN THE NUDE WITH HER UNCLE AND A MONK DRINKING CHAMPAGNE WITH STRAWBERRIES. THEY ARE TALKING ABOUT A PLAN TO TRICK THE FATHER OF THE OTHER YOUNG GIRL INTO HAVING SEX WITH HIS DAUGHTER WITHOUT HIM KNOWING IT. (38:51-39:05) DEPICTS THE WIFE OF THE UNCLE OF THE FIRST YOUNG GIRL SITTING IN THE BEDROOM, DRINKING COFFEE OR COCOA, AND PREPARING TO GO TO BED.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 8 OF 17 PARTS
(39:09-41:56) SHE GETS IN BED AS "MONK" JOHN HOLMES CLIMBS UP THE BALCONY IN SEARCH OF THE 14 YEAR OLD DAUGHTER BUT UNWITTINGLY CLIMBS INTO THE BEDROOM OF THE WIFE OF THE GIRL'S UNCLE. (41:59-44:40) HE GETS INTO BED WITH HER AND PERFORMS CUNNILINGUS ON HER AND SEXUAL INTERCOURSE.

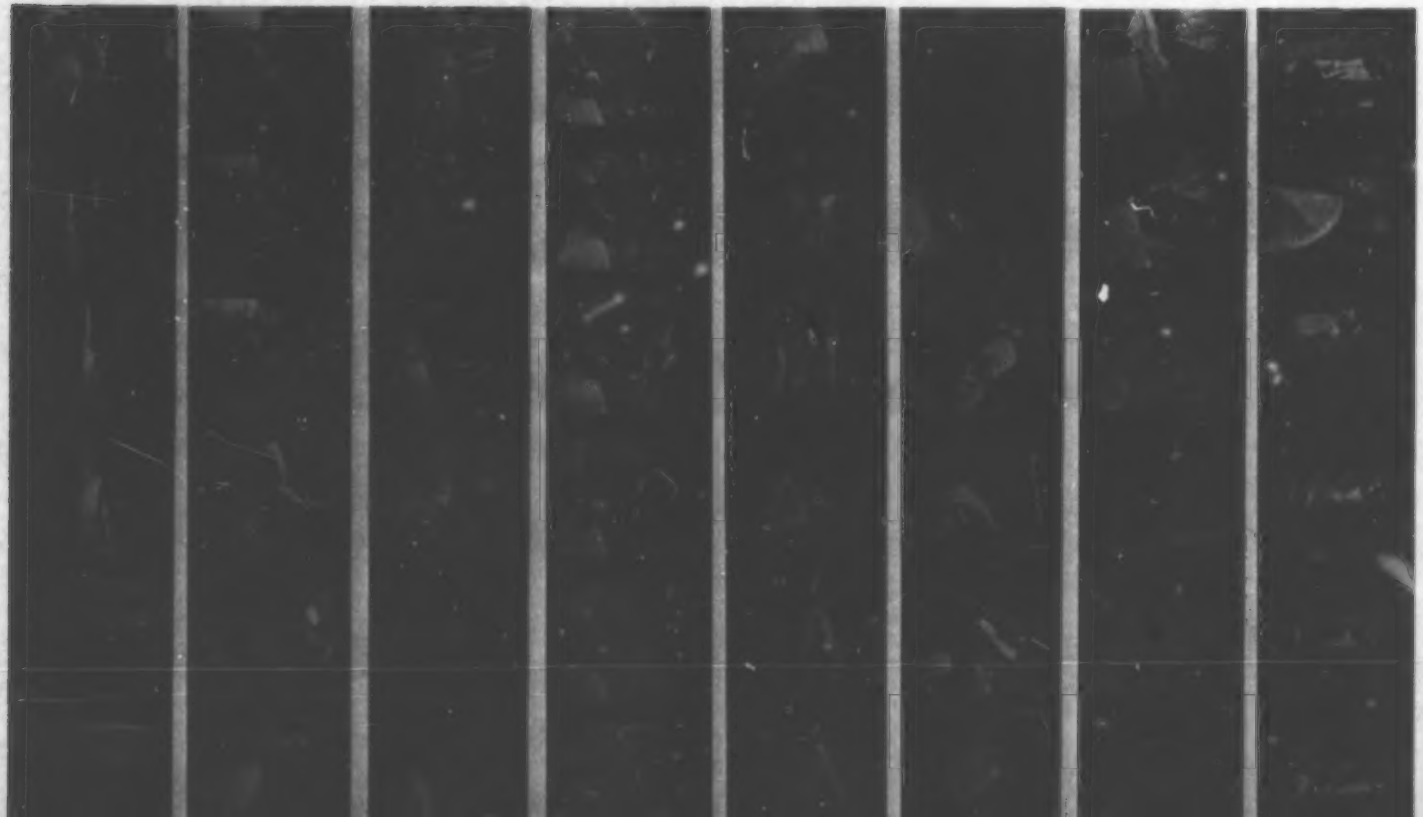
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 9 OF 17 PARTS
(44:43-46:00) HE ENGAGES IN SEXUAL INTERCOURSE WITH HER. (46:03-46:21) THE HUSBAND (UNCLE) OF THE WOMAN ENTERS AND CHASES JOHN HOLMES AROUND THE BED. JOHN HOLMES JUMPS OUT THE WINDOW. (46:24-46:42) THE UNCLE RETURNS TO HIS WIFE'S BEDSIDE. (46:45-50:14) SCENE SHIFTS TO THE SECOND YOUNG GIRL'S HOUSE WHERE THE FIRST GIRL MEETS THE FATHER OF HER GIRLFRIEND, THEY FLIRT AND TALK.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).

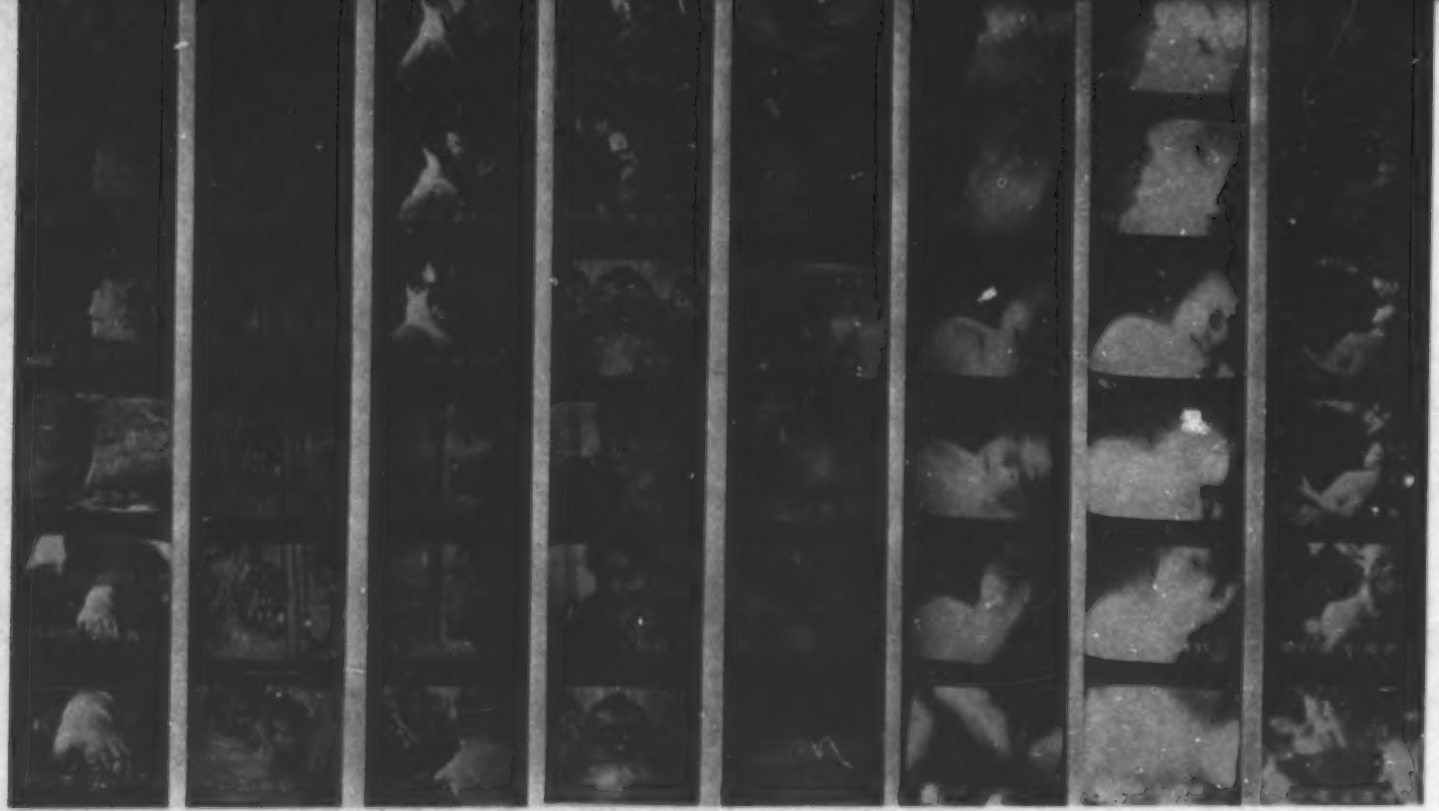




"THE AUTOBIOGRAPHY OF A FLEA"
PART 10 OF 17 PARTS
(50:18-50:28) IS THE ENDING OF THE MEETING BETWEEN THE YOUNG GIRL'S FATHER AND HER GIRLFRIEND. (50:32-51:07) AN OUTDOOR SCENE SHOWING THE 14 YEAR OLD GIRL WALKING IN A FIELD. (51:10-51:35) DEPICT HER LOOKING ON A BANK AND SEEING A MALE MASTURBATE. THE MALE SEES HER AND PULLS HIS PANTS UP. (51:38-52:51) HE TALKS TO HER AND TELLS HER HE WOULD LIKE TO HAVE INTERCOURSE WITH HER USING THE WORD "FUCK." (52:55-55:49) SHE BEGINS TO HAVE SEXUAL INTERCOURSE WITH HIM ON THE GRASS AS THE YOUNG MAN'S FATHER ENTERS THE SCENE AND URGES HIM ON.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 11 OF 17 PARTS
(55:53-56:38) THE INTERCOURSE BETWEEN THE SON AND THE FEMALE ON THE GRASS CONTINUES WHILE THE FATHER URGES THE SON ON. (56:41-60:42) THE SCENE SHIFTS TO THE YOUNG 14 YEAR OLD FEMALE AND HER GIRLFRIEND TALKING ABOUT SEX. FLASHBACK SCENES OF GIRLFRIEND AND ONE OF THE MONKS TOGETHER.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 12 OF 17 PARTS
(60:46-61:52) FLASHBACK SCENES OF GIRLFRIEND AND MONK. THEY DEPICT FURTHER CONVERSATION BETWEEN THE TWO GIRLS. THE 14 YEAR OLD TELLING THE GIRLFRIEND THAT SHE SHOULD HAVE SEX. (61:56-62:51) UNCLE'S HOUSE. THEY HAVE ARRANGED FOR THE FATHER OF THE GIRL TO HAVE SEX WITH THE GIRL. HE DOES NOT REALIZE IT WILL BE HIS DAUGHTER. (62:55-64:23) DEPICTS THE DAUGHTER LYING ON A BED WITH HER HEAD COVERED. THE FATHER ENTERS THE ROOM AND BEGINS TO MASTURBATE HIS DAUGHTER NOT REALIZING THAT IT IS HIS DAUGHTER. (64:27-66:10) DEPICTS THE FATHER STILL MASTURBATING HIS DAUGHTER, HER HEAD IS COVERED. HE DISROBES AND ENGAGES IN SEXUAL INTERCOURSE WITH HER. (66:13-66:35) 14 YEAR OLD FEMALE IS WATCHING FROM BEHIND CURTAIN.

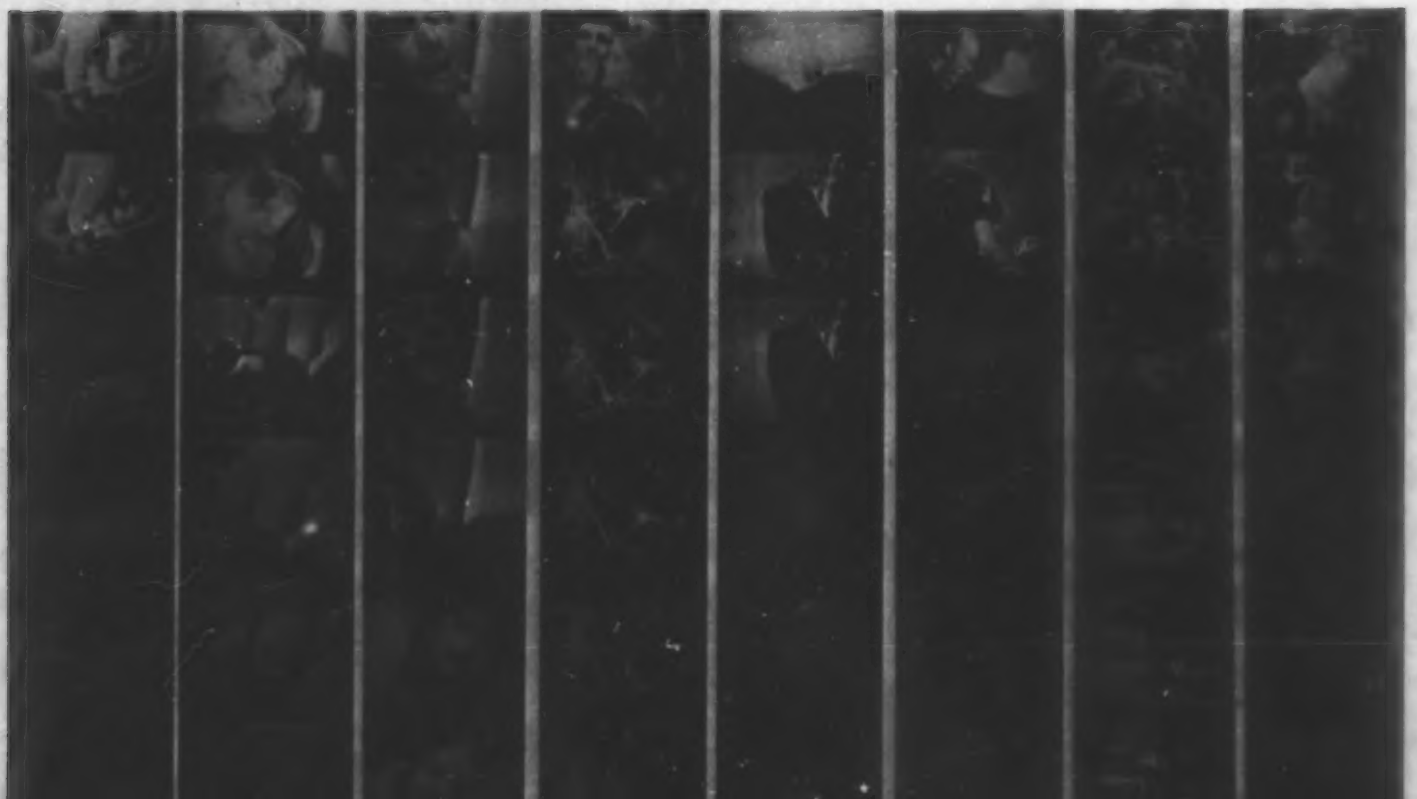
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 13 OF 17 PARTS
(66:39-68:51) THE FATHER CONTINUES TO ENGAGE IN SEXUAL INTERCOURSE WITH HIS DAUGHTER. HE REMOVES HIS PENIS FROM HER VAGINA AND EJACULATES ON HER STOMACH. (68:55-69:47) MALE LOOKS UP TO SEE 14 YEAR OLD FEMALE WATCHING. SHE LEAVES AND HE FOLLOWS. (69:50-70:27) SHE THEN MEETS THE FATHER IN ANOTHER ROOM, TELLS HIM HE WAS ENGAGING IN INTERCOURSE WITH HIS DAUGHTER. (70:31-72:28) FEMALE CONTINUES TO TALK ABOUT HOW THE FATHER ENGAGED IN INTERCOURSE WITH HIS OWN DAUGHTER. HE THEN ENGAGES IN INTERCOURSE WITH THE 14 YEAR OLD FEMALE.

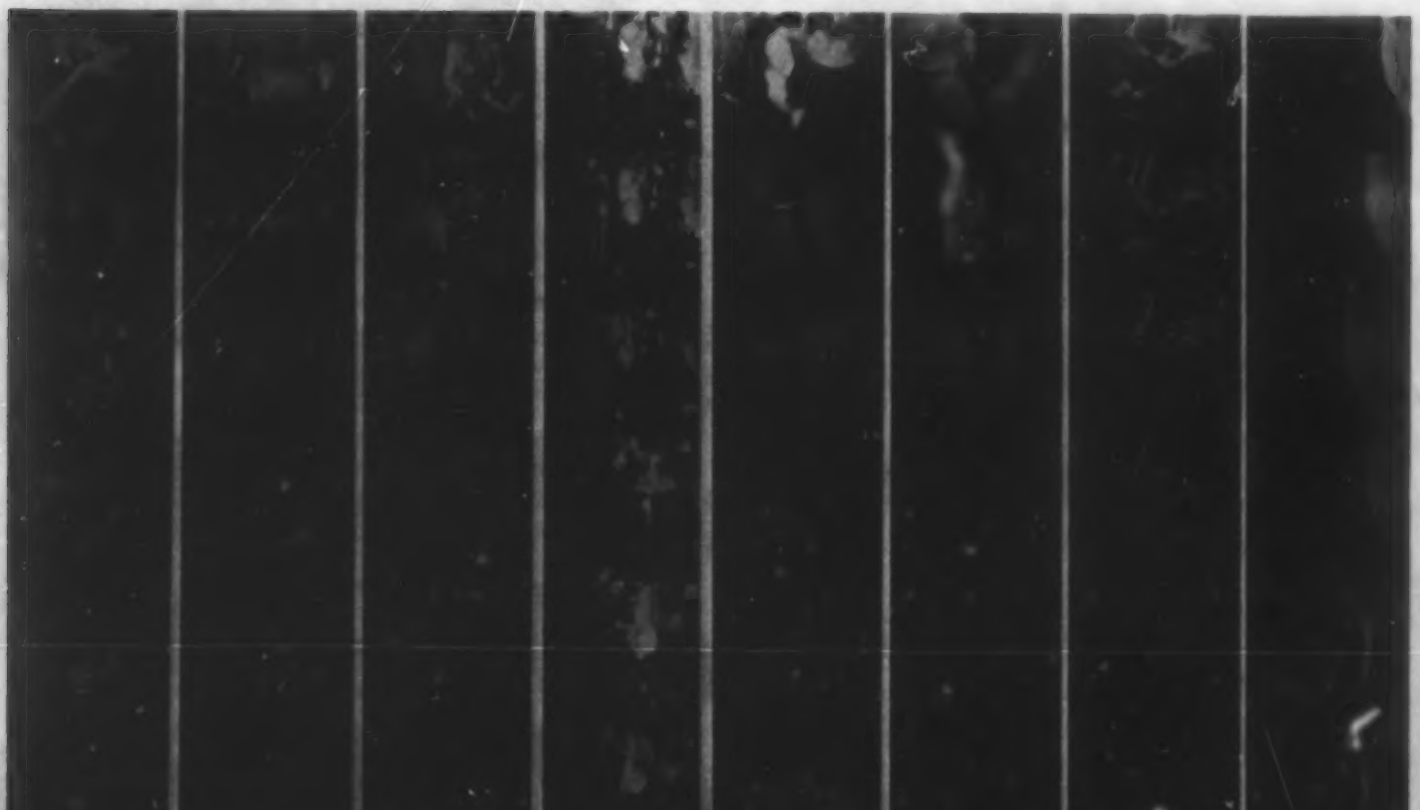
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 14 OF 17 PARTS
(72:32-74:44) THE FATHER OF THE GIRL CONTINUES TO HAVE SEXUAL INTERCOURSE WITH THE 14 YEAR OLD FEMALE. (74:48-76:27) THE UNCLE AND THE MONK BRING THE DAUGHTER OF THE MAN, LIE HER ON THE FLOOR. (76:31-78:21) THE MONK THEN BEGINS TO HAVE INTERCOURSE WITH HER WHILE HER FATHER WATCHES AND MASTURBATES.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 15 OF 17 PARTS
(78:25-78:43) THE FATHER CONTINUES TO MASTURBATE WHILE HE WATCHES HIS DAUGHTER ENGAGING IN SEXUAL INTERCOURSE WITH THE MONK. (78:47-79:28) THE 14 YEAR OLD ENGAGES IN SEXUAL INTERCOURSE WITH HER UNCLE IN THE SAME ROOM. (79:31-80:48) ACTIVITY CONTINUES. (80:52-82:17) DEPICTS THE FATHER ENGAGING IN SEXUAL INTERCOURSE WITH HIS DAUGHTER AND HE NOW KNOWS IT IS HIS DAUGHTER. THEY ENGAGE IN SEXUAL INTERCOURSE WHILE SHE LEANS AGAINST THE FIREPLACE. SEXUAL INTERCOURSE IS FROM THE REAR POSITION. (82:20-83:08) THE FATHER HAS A HEART ATTACK AND KEELS OVER. HE FALLS ON THE FLOOR AND THE OTHER PEOPLE IN THE ROOM DON'T REALIZE HE IS DEAD. (83:12-84:14) THE FATHER LIES DEAD ON THE FLOOR WHILE THE OTHER PEOPLE ENGAGE IN SEXUAL INTERCOURSE.

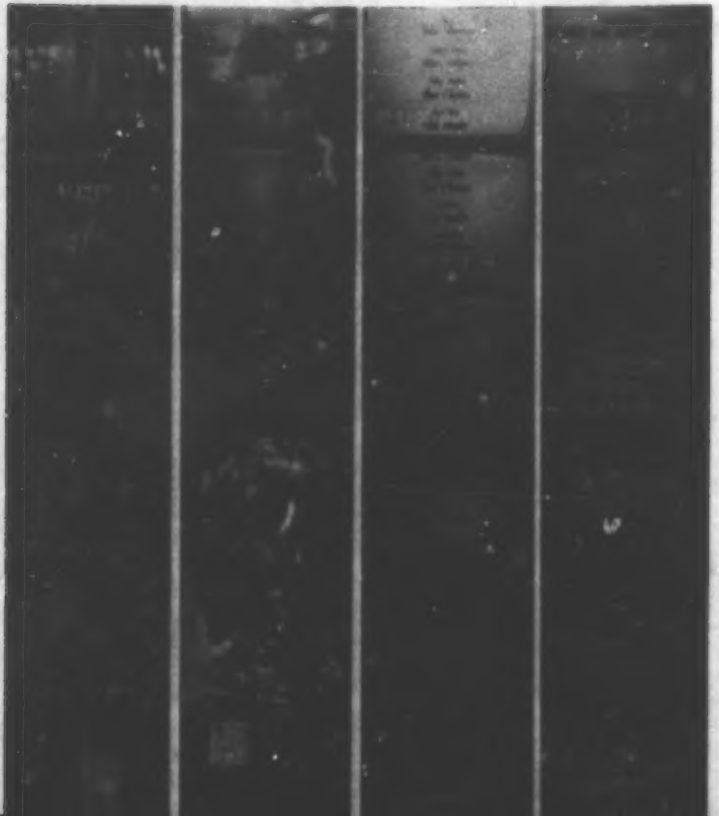
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"THE AUTOBIOGRAPHY OF A FLEA"
PART 16 OF 17 PARTS
(84:18-85:46) ACTIVITY CONTINUES. (85:50-86:30) THEY REALIZE THAT THE FATHER HAS DIED. (86:34-87:07) THE SCENE SHIFTS TO WHERE THE TWO FEMALES ARE IN BED TALKING. (87:11-88:43) "MONK" HOLMES ENTERS THE ROOM AND DISROBES AND GETS INTO BED WITH THE TWO FEMALES. THEY ALL GET UNDER THE COVERS. (88:46-89:56) DEPICTS A SHIFT SHOWING THE WIFE OF THE DEAD HUSBAND WHO IS NOW SUPPOSEDLY A MENTAL CASE. (90:00-90:07) THE SCENE AGAIN SHIFTS TO THE TWO YOUNG FEMALES IN A CHURCH WITH VEILS ON. THEY ARE APPARENTLY TAKING VOWS OF CHASTITY, ENTERING A MONASTERY TO LIVE WITH THE MONKS.

"THE AUTOBIOGRAPHY OF A FLEA": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46834) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: OCT. 12, 1976).





"THE AUTOBIOGRAPHY OF A FLEA"
PART 17 OF 17 PARTS
(90:11-91:35) DEPICT THE END OF THE FEATURE. THE FLEA NARRATES THAT HE HAS LEFT THE VAGINA OF THE 14 YEAR OLD AND HE HAS ENTERED THE VAGINA OF ANOTHER FEMALE. (91:39-93:04) CREDITS. THE END.

APPENDIX D

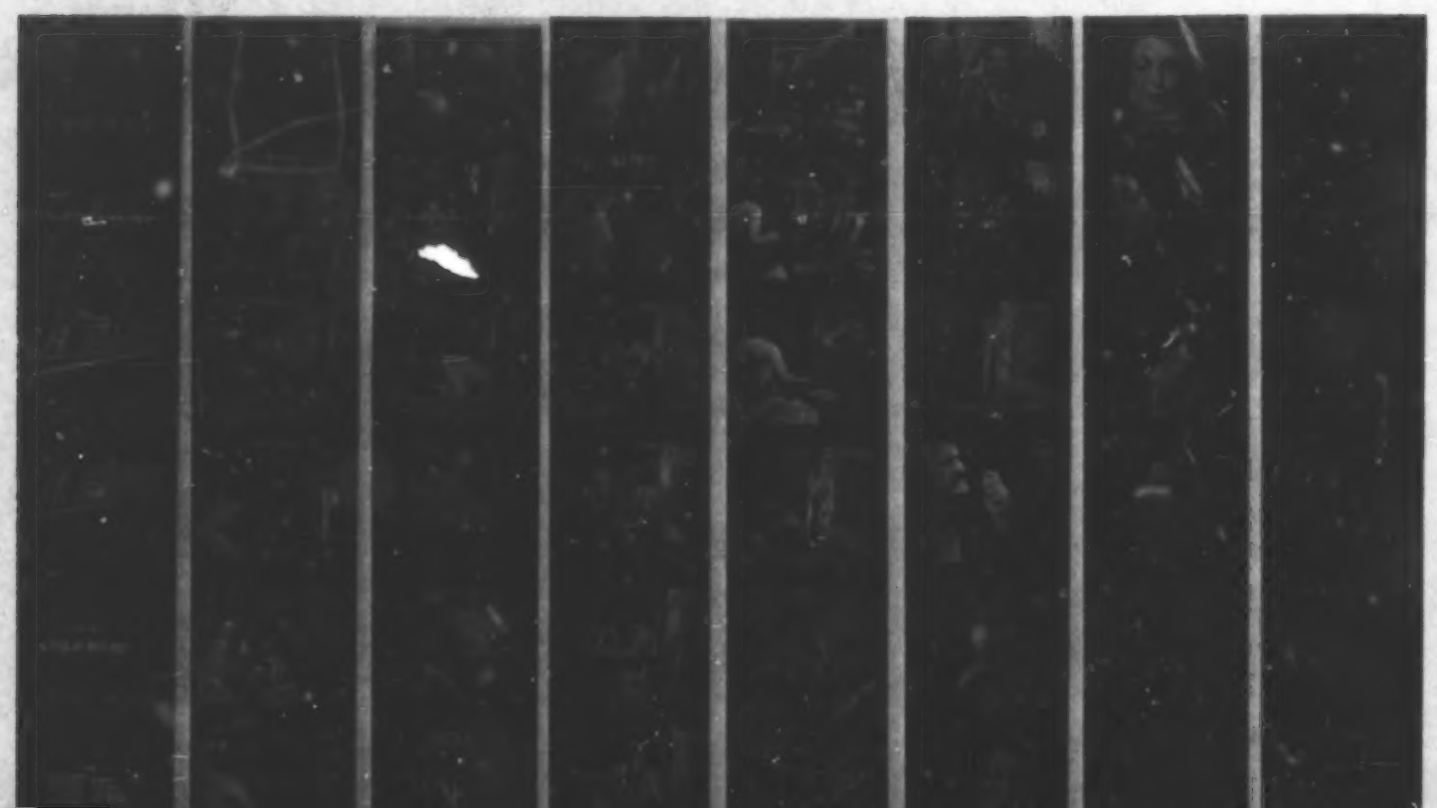
TIME-MOTION STUDY* OF THE FILM

"C.B. MAMAS"

The motion picture film "C.B. Mamas" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 11, 1976.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

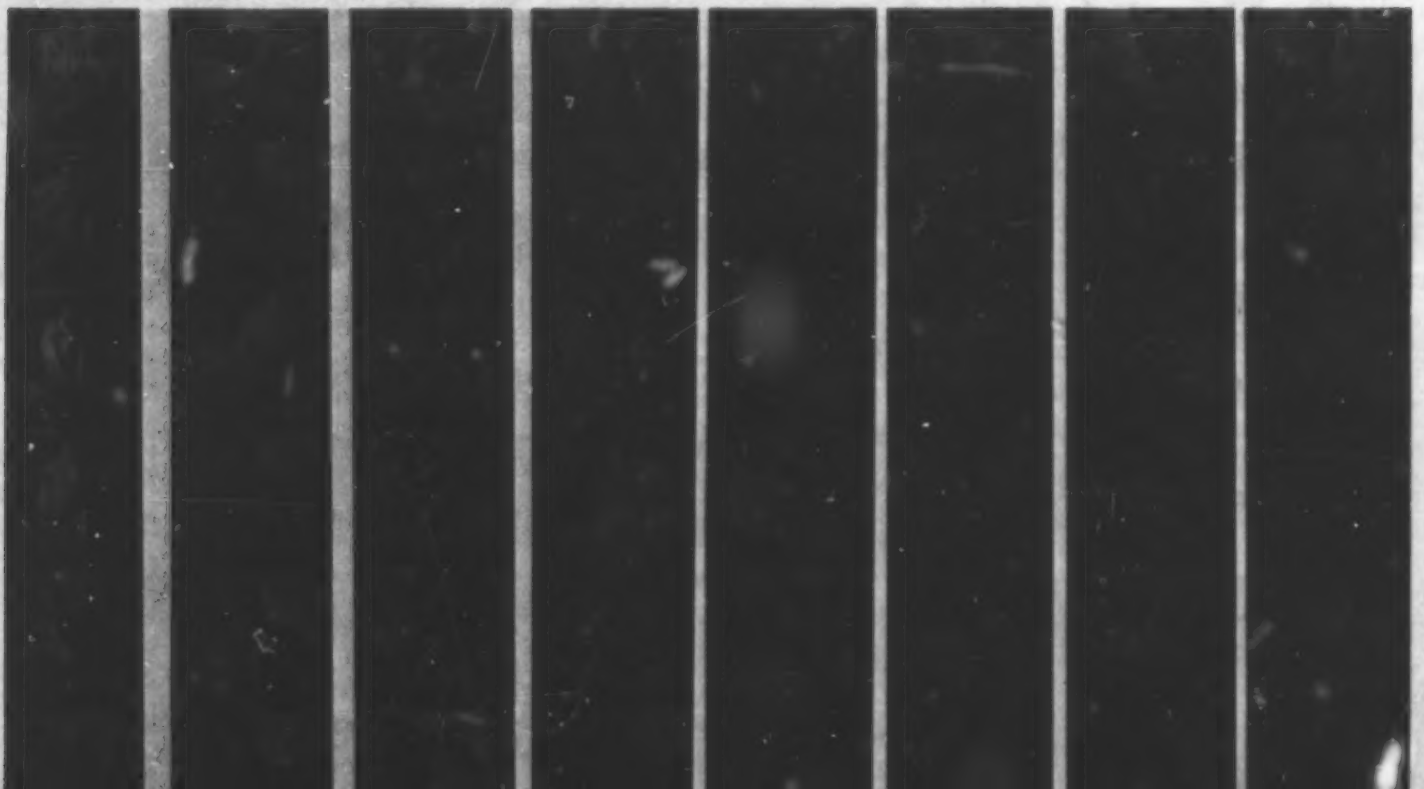
"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.B. MAMAS"
PART 1 OF 10 PARTS
(00:06-00:32) CREDITS. (00:35-01:17) INTRODUCTORY SCENES. (00:56-1:06) HOUSEWIFE LESLIE IN HOUSEROBE AND CURLERS PHONES GIRLFRIEND TO TELL HER THAT SHE WILL HAVE EVERYTHING READY IN 10 MINUTES. (1:07-1:17) LESLIE SAYS "GOOD-BYE" TO HER HUSBAND. (1:21-1:59) AND HASTELY CLEANS UP HOUSE FOR MEETING. (2:03-3:13) FEMALES GATHER FOR PARTY. (3:16-3:37) FOUR FEMALES MEET AND BROADCAST AN INVITATION TO MALES OVER "C.B." EQUIPMENT. (3:41-4:40) FOUR MALES RESPOND. (4:43-5:36) NAVY PILOT JUMPS FROM AN AIRPLANE. FIRST FEMALE, ON BED, EXPOSES HERSELF AS MALE IN PILOT'S UNIFORM WATCHES.

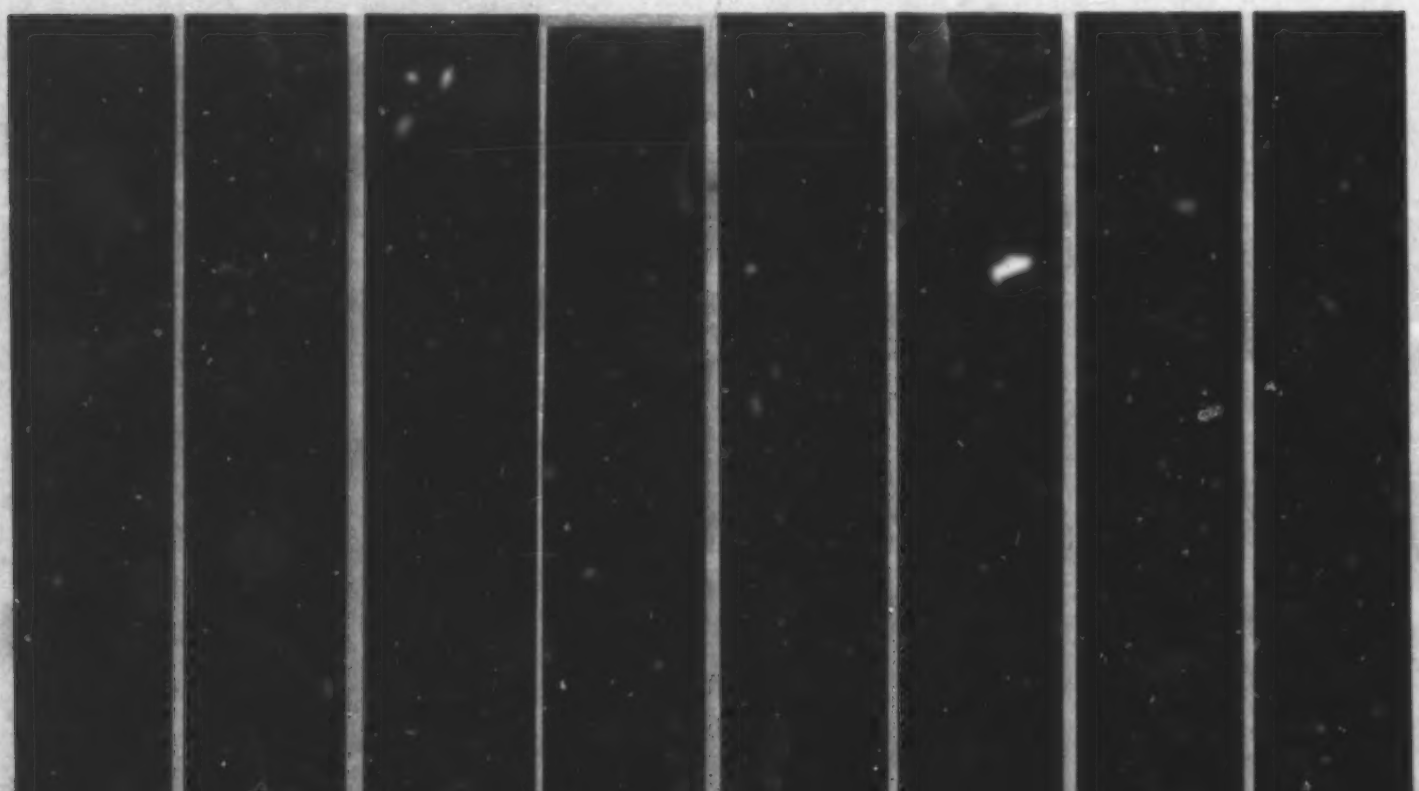
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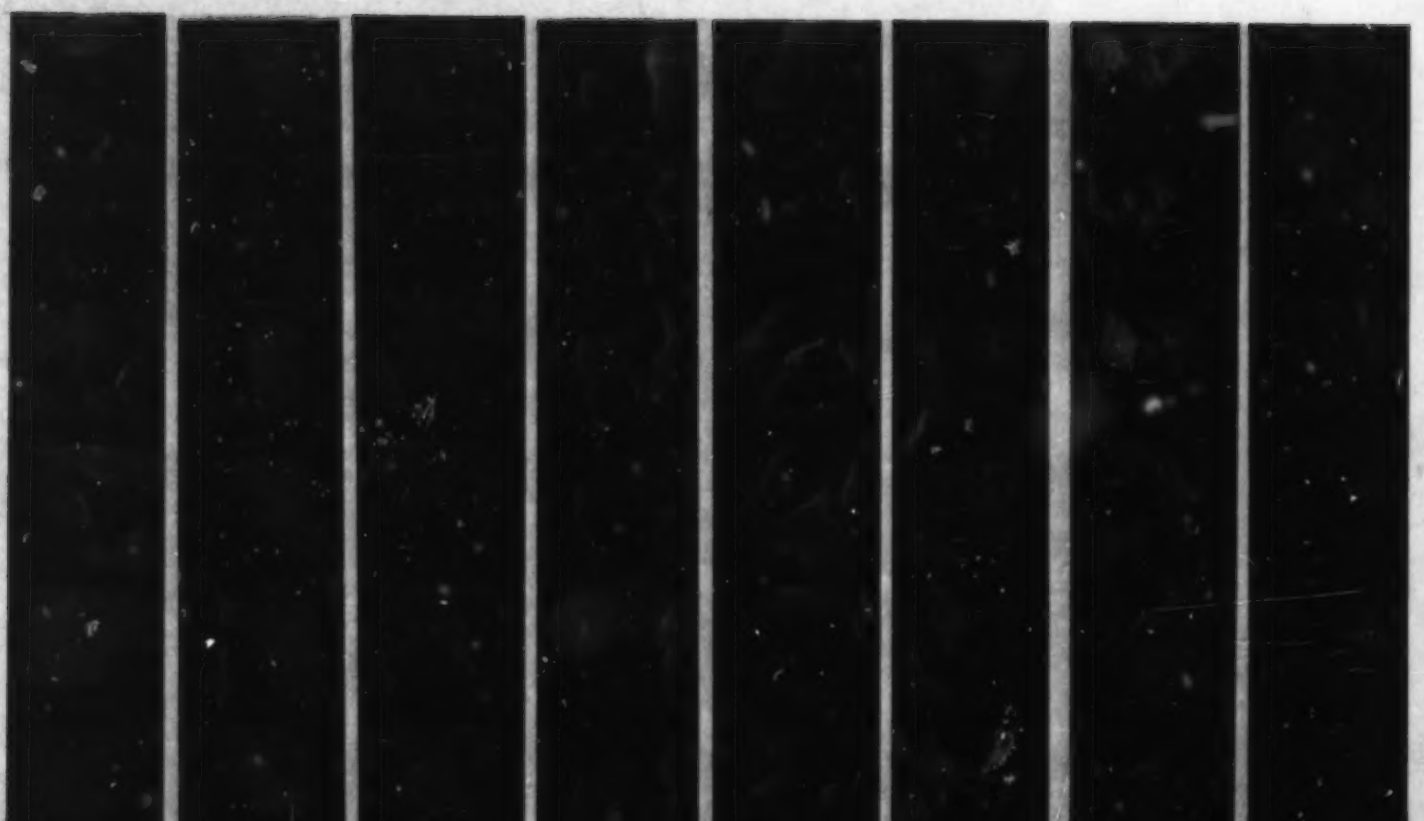
"C.B. MAMAS"
PART 2 OF 10 PARTS
(5:40-5:57) PILOT UNDRESSES AND PERFORMS CUNNILINGUS. (6:01-6:11) SEXUAL INTERCOURSE. (6:14-7:55) FEMALE PERFORMS FELLATIO ON PILOT. (7:59-9:51) FEMALE MOUNTS PILOT FOR SEXUAL INTERCOURSE. (9:55-11:11) SECOND MALE INVITES SECOND FEMALE "ITS TIME TO PLAY RUBBER DUCKY." MALE UNDRESSES FEMALE IN BATHROOM.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





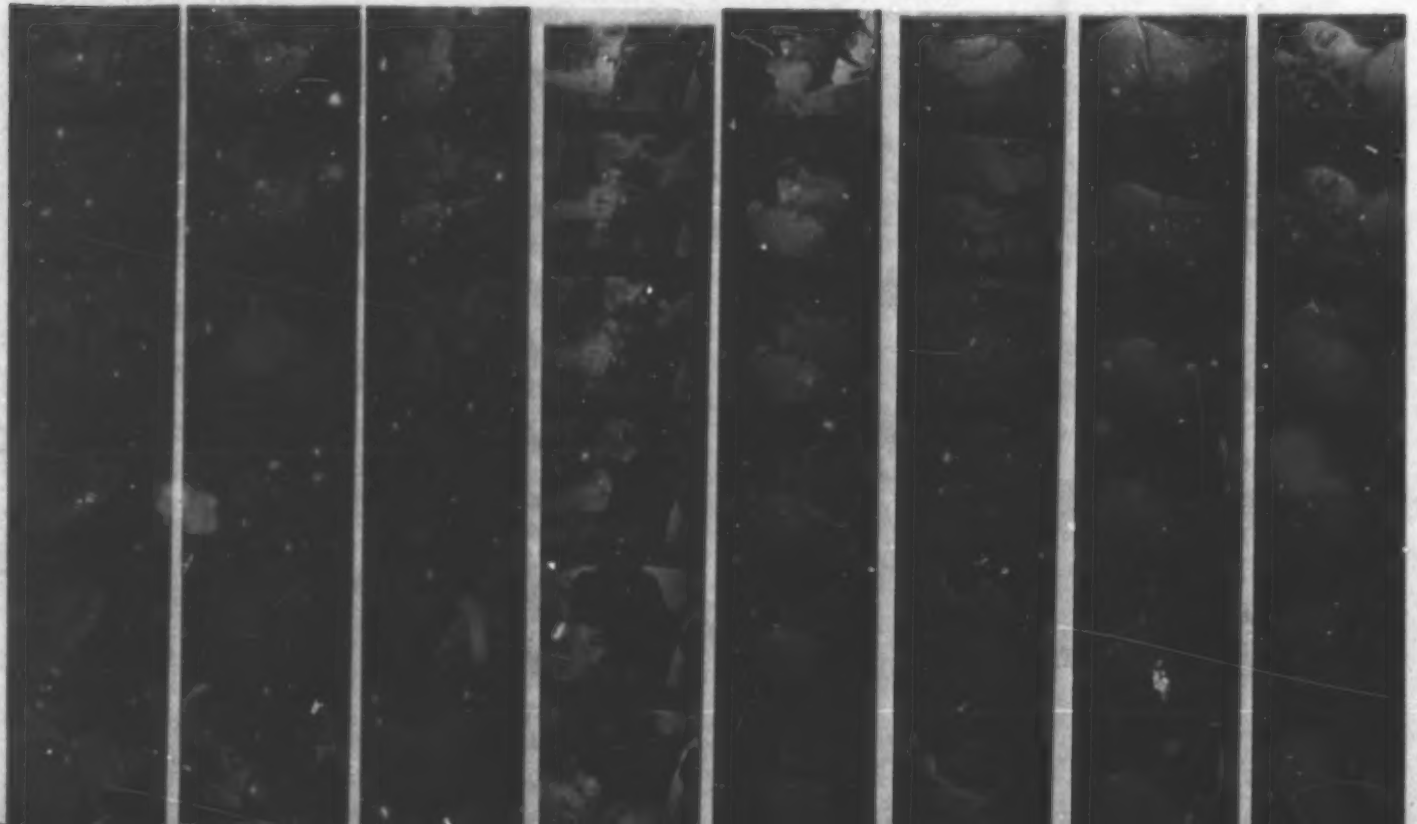
"C.B. MAMAS"
PART 3 OF 10 PARTS
(11:15-13:30) NUDE FEMALE, HOLDING SUCKER, IS IN TUB AS SECOND MALE BEGINS SCRUBBING HER BREASTS, THIGH, FEET AND VAGINA. (13:42-15:12) SECOND FEMALE PERFORMS FELLATIO ON SECOND MALE. (15:15-16:47) SECOND MALE AND SECOND FEMALE ENGAGE IN SEXUAL INTERCOURSE WITH MALE RECLINING.

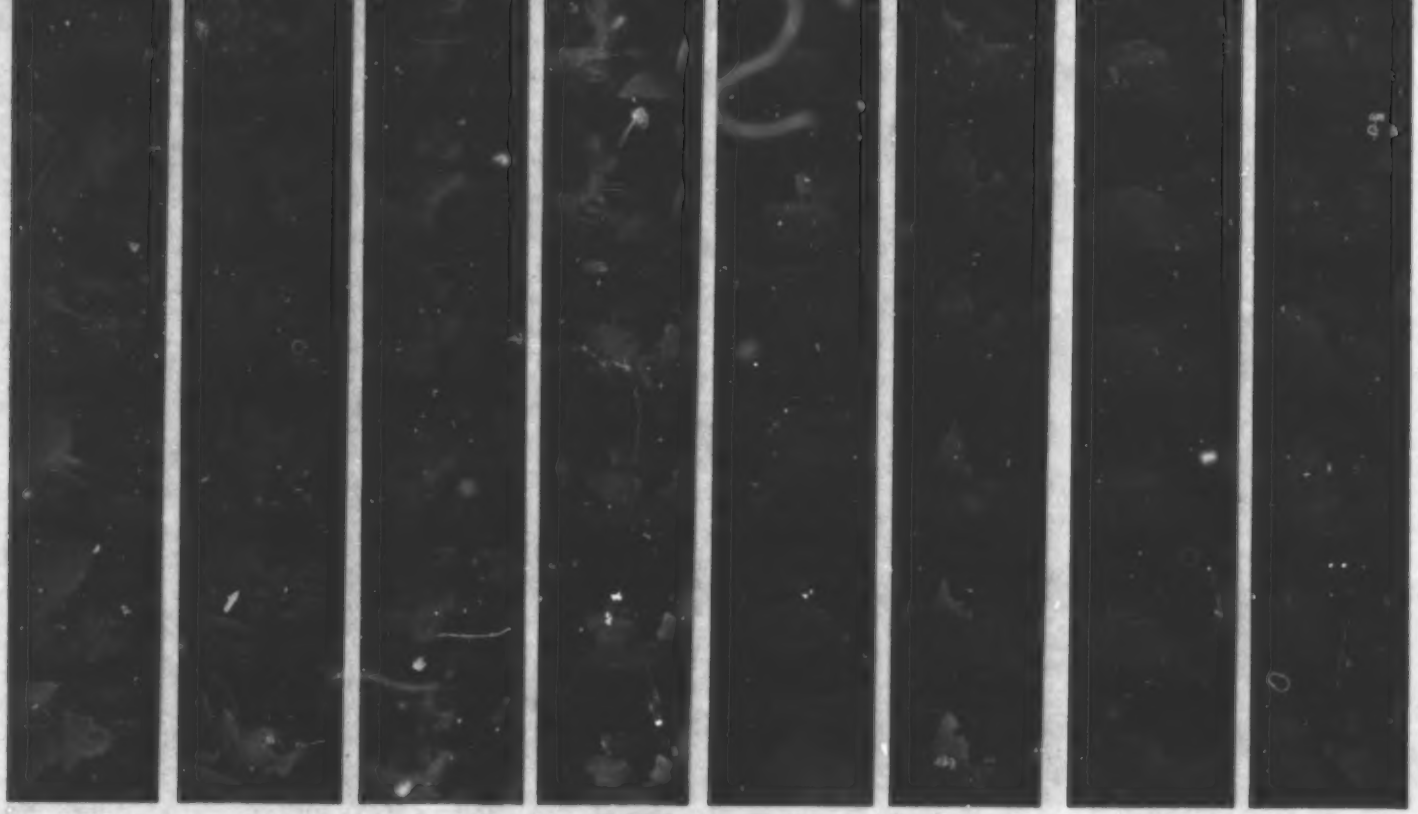




"C.B. MAMAS"
PART 4 OF 10 PARTS
(16:50-17:01) EJACULATION. (17:04-19:55) THIRD MALE ENGAGES THIRD FEMALE IN SEXUAL INTERCOURSE FROM THE REAR. (19:59-21:12) FELLATIO. (21:16-22:22) SEXUAL INTERCOURSE WITH FEMALE RECLINING.

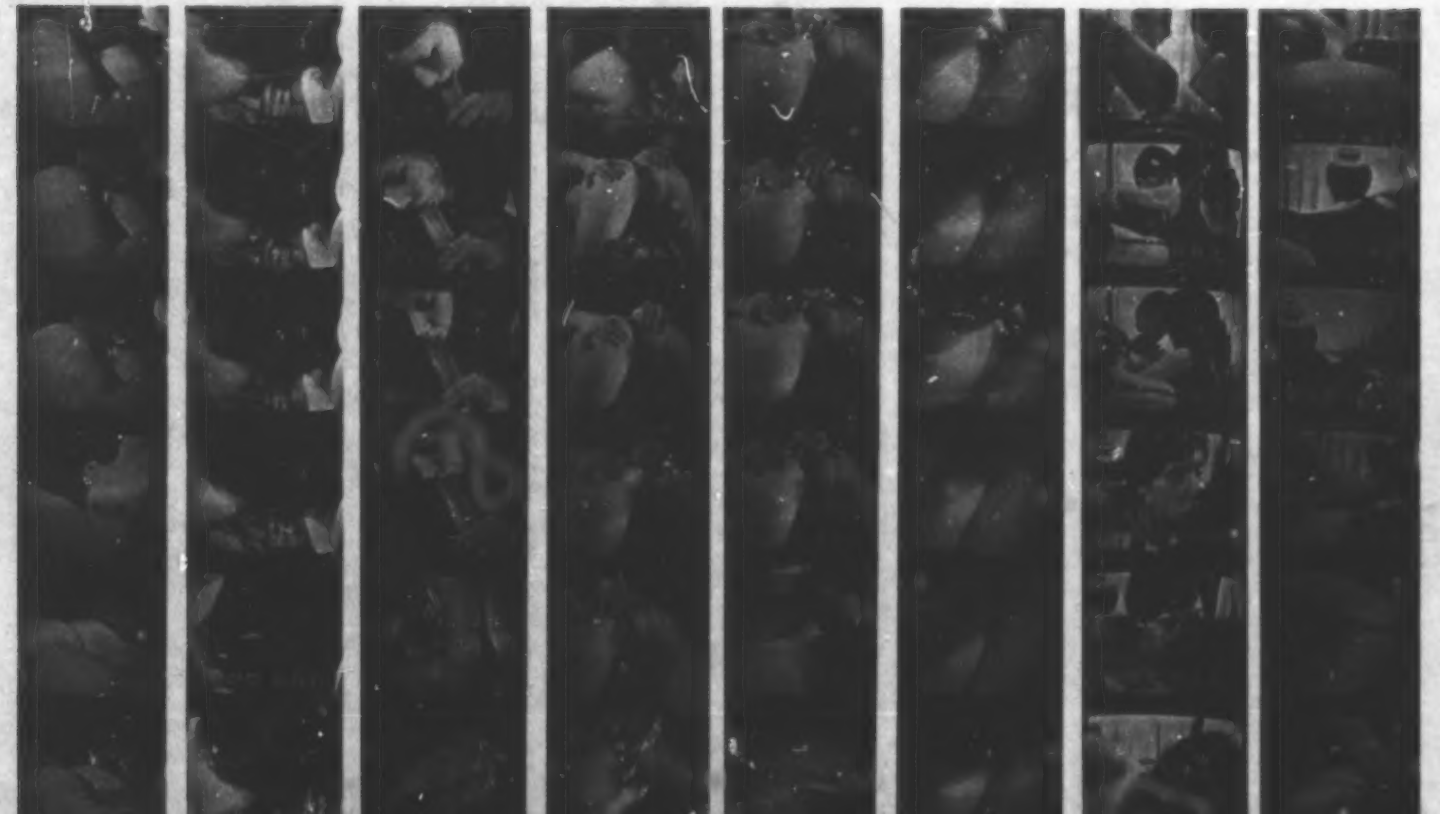
"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.B. MAMAS"
PART 5 OF 10 PARTS
(22:26-23:19) SEXUAL INTERCOURSE. (23:22-24:56) FELLATIO. (24:59-27:57) MALE KISSES, MASSAGES BREASTS, THEN LICKS ANUS OF FEMALE, AS FEMALE MASTURBATES.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.B. MAMAS"
PART 6 OF 10 PARTS
(28:01-29:07) MALE LICKS ANUS OF FEMALE AS SHE MASTURBATES. (29:11-29:35) FELLATIO. (29:39-30:07) SEXUAL INTERCOURSE MALE SUPERIOR. (30:10-30:59) FEMALE EXPOSES HER VAGINA AND PLACES HER FINGER IN HER ANUS. (31:02-31:58) SEXUAL INTERCOURSE FROM THE REAR. (32:02-33:33) TWO FEMALES ENGAGE IN LESBIAN ACTIVITY.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11. 1976).





"C.B. MAMAS"
PART 7 OF 10 PARTS
(33:36-33:54) TWO FEMALES ENGAGE IN LESBIAN ACTIVITY. LESBIAN KISSING. (33:57-34:46) CUNNILINGUS. (34:49-36:10) DOUBLE CUNNILINGUS. (36:13-38:08) CUNNILINGUS. (38:12-39:08) MALE INTERRUPTS LESBIAN ACTIVITY AND ENGAGES FEMALE IN SEXUAL INTERCOURSE.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. I P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).

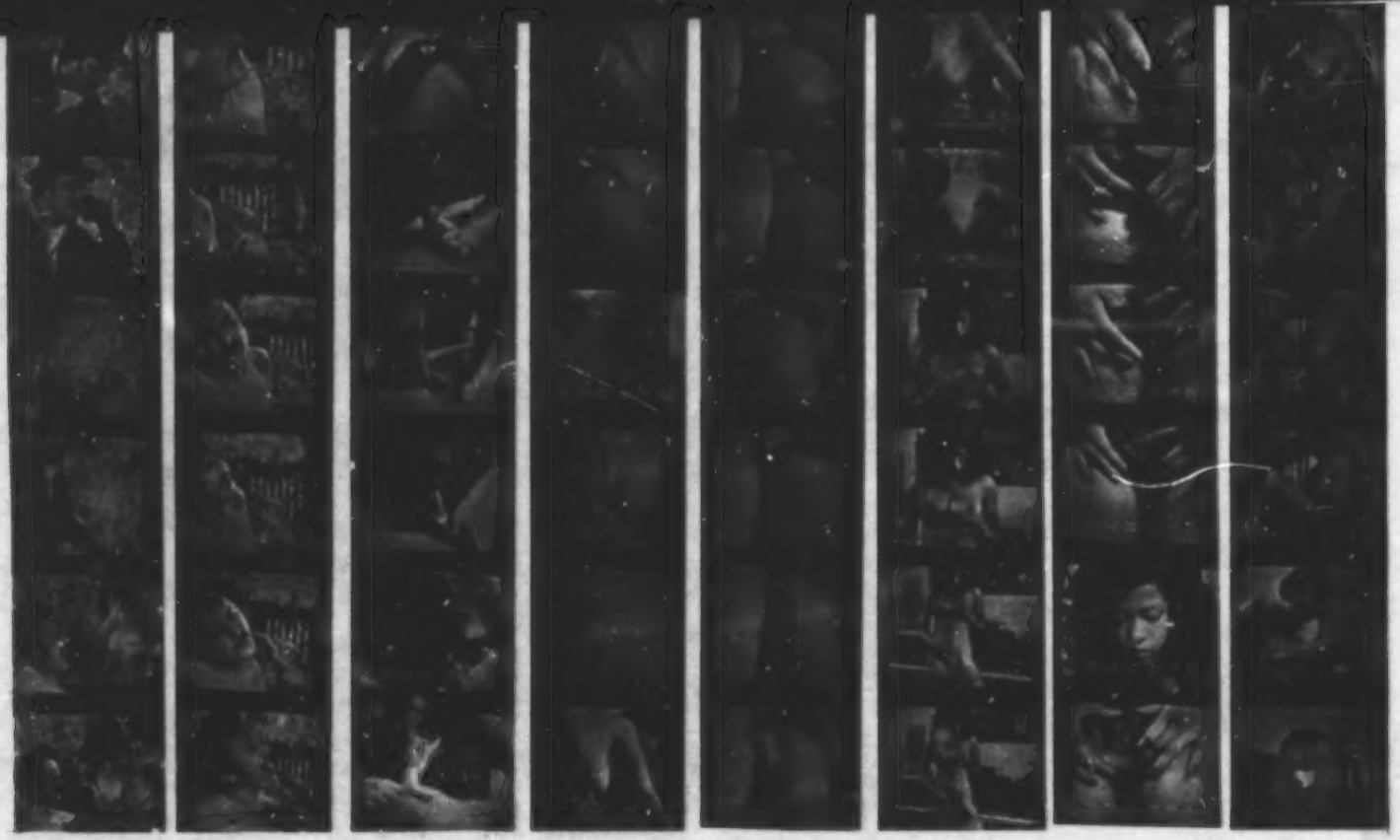




"C.B. MAMAS"
PART 8 OF 10 PARTS
(39:11-40:42) MALE ENGAGES FEMALE IN SEXUAL INTERCOURSE WITH MALE SUPERIOR. (40:46-40:49) FEMALE ENGAGES IN SEXUAL INTERCOURSE WITH FEMALE SUPERIOR. (40:53-41:34) FELLATIO. (41:38-42:20) SEXUAL INTERCOURSE FROM THE REAR. (42:23-44:15) LESLIE'S DAUGHTER LIES ON HER BED AND BEGINS TO MASTURBATE, SHE SAYS "MOM, SHIT. HER AND HER PARTY. WHAT ABOUT ME. I WANT SOME PARTY TOO." (44:20-44:43) A MALE ENTERS AND SAYS "EXCUSE ME, HEY YOU KNOW WHERE I CAN GET SOME MILK FOR MY COFFEE?" FEMALE MANIPULATES HER BREAST AND SQUIRTS MILK INTO A CUP.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.B. MAMAS"
PART 9 OF 10 PARTS
(44:46-46:17) FEMALE (LESLIE'S DAUGHTER) CONTINUES TO MANIPULATE HER BREASTS AND SQUIRT MILK AT MALE'S FACE. (46:21-47:27) SHE PERFORMS FELLATIO ON MALE. (47:30-48:40) MALE PERFORMS SEXUAL INTERCOURSE FROM THE REAR. (48:44-49:54) FEMALE NEGRO MASSAGES HER BREASTS AND VAGINAL AREA. (49:57-50:18) NUDE MALE KISSES FEMALE AND MASSAGES HER BREAST.

"C.B. MAMAS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. L.P. 46891) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO MOOKS, INC. (DATE OF ISSUANCE: NOV. 11, 1976).





"C.B. MAMAS"
PART 10 OF 10 PARTS
(50:21-50:58) KISSING CONTINUES. (51:00-51:49) FELLATIO. (51:52-54:36) SEXUAL INTERCOURSE WITH FEMALE SUPERIOR. (54:40-54:43) EJACULATION ON FEMALE'S STOMACH. PARTY IS OVER. (54:47-55:01) RETURN TO FEMALE IN HOUSECOAT AND CURLERS. (55:04-55:49) LESLIE IN HOUSECOAT AND HAIR CURLERS OPENS THE DOORS FOR HER HUSBAND; SHE BERATES HIM "YOU GOT A BOOZE SMELL ON YOU AGAIN" ETC., ETC. FEATURE ENDS.

APPENDIX D

TIME-MOTION STUDY* OF THE FILM

"INSIDE MARILYN CHAMBERS"

The motion picture film "Inside Marilyn Chambers" was issued a "Certificate of Registration of a Claim to Copyright" by the Copyright Office on Nov. 18, 1976.

* A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Photographs have been taken every 3.6 seconds playing time.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





"INSIDE MARILYN CHAMBERS"
PART 1 OF 14 PARTS
(00:03-04:42) DEPICT THE TITLE "INSIDE MARILYN CHAMBERS" PLUS VARIOUS SHOTS OF HER WALKING AND TALKING.
(04:45-05:34) DEPICT SEXUAL INTERCOURSE.

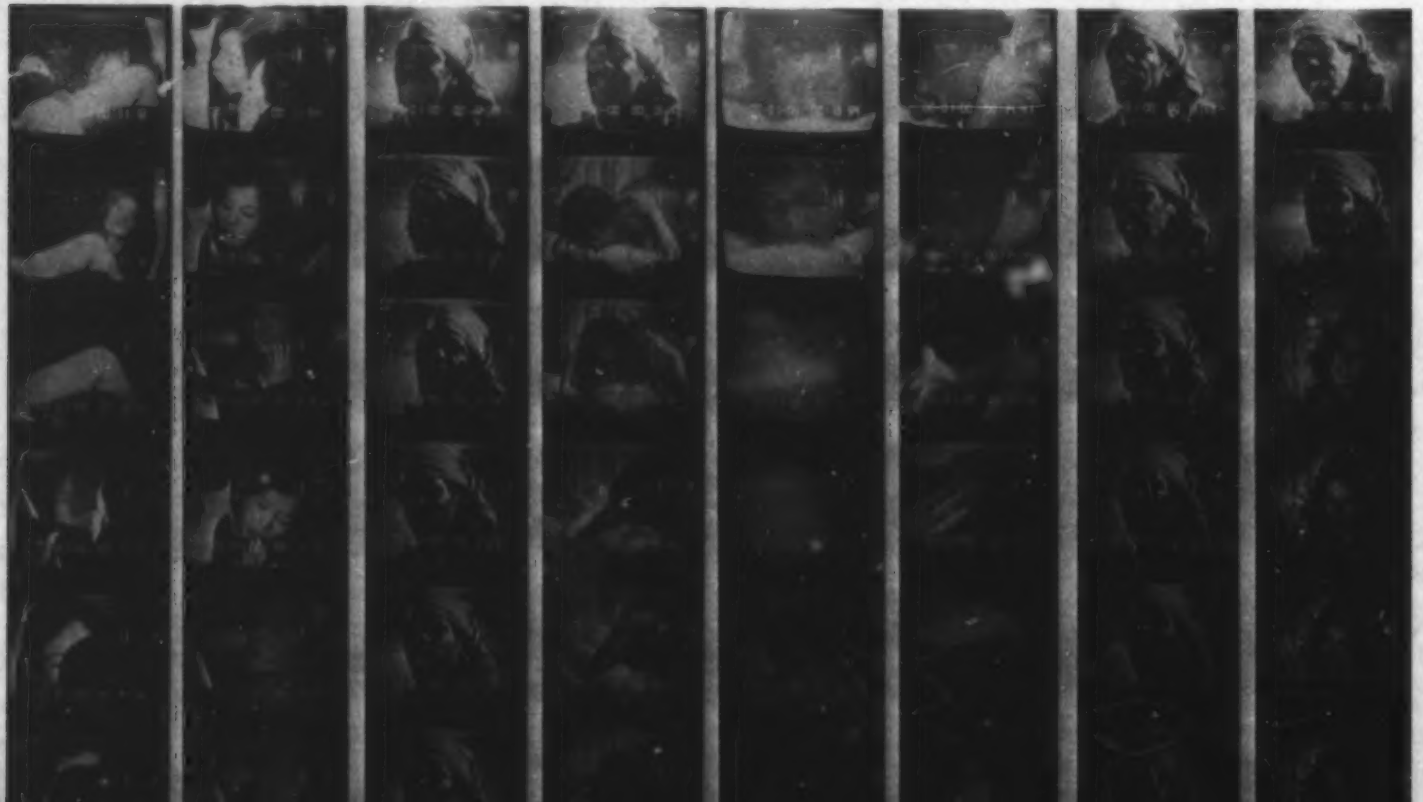
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"INSIDE MARILYN CHAMBERS"
PART 2 OF 14 PARTS
(05:37-09:13) TWO FEMALES ARE ENGAGED IN FONDLING AND MASTURBATION. ALSO, SOME SEXUAL INTERCOURSE SCENES WITH MARILYN CHAMBERS. (09:17-10:09) CONTINUE TO DEPICT SEXUAL ACTIVITY. (10:12-10:40) MALE NEGRO STAR JOHNNY KEYES IS INTERVIEWED AND RECALLS HIS MEETING WITH MARILYN CHAMBERS. (10:44-11:08) FEMALES PREPARE FOR FELLATIO.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).

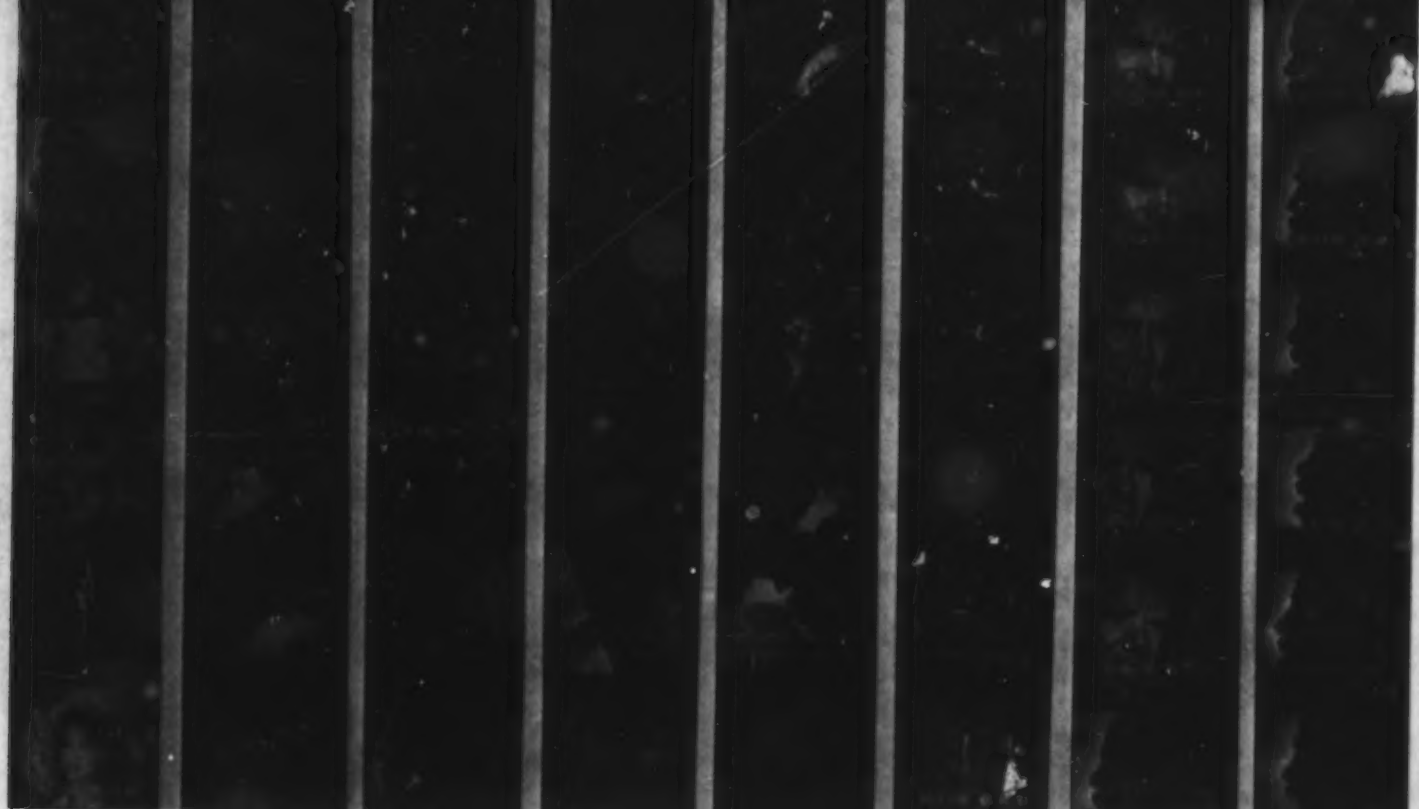




"INSIDE MARILYN CHAMBERS"
PART 3 OF 14 PARTS
(11:12-15:02) CONTAINS SCENES THAT WERE NOT SHOWN IN "BEHIND THE GREEN DOOR" SHOWING TWO FEMALES FELLATING JOHNNY KEYES. HE RECALLS THOSE SCENES AND RELATES HOW HE AND MARILYN MET. SCENES OF KEYES AND CHAMBERS ENGAGED IN CUNNILINGUS AND SEXUAL INTERCOURSE. (15:05-16:43) FACES OF KEYES AND MARILYN CHAMBERS AS INTERVIEWS CONTINUE.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976)





"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





"INSIDE MARILYN CHAMBERS"
PART 5 OF 14 PARTS
(22:21-23:13) KEYES AND MARILYN CHAMBERS CONTINUE TALKING. (23:16-26:42) SHOW KEYES, CHAMBERS AND ANOTHER FEMALE IN BED. CHAMBERS LEAVES THE BED AND THE OTHER FEMALE ENGAGES KEYES IN FELLATIO. MARILYN CHAMBERS FELLATES JOHNNY KEYES. (26:45-27:52) SEXUAL INTERCOURSE.

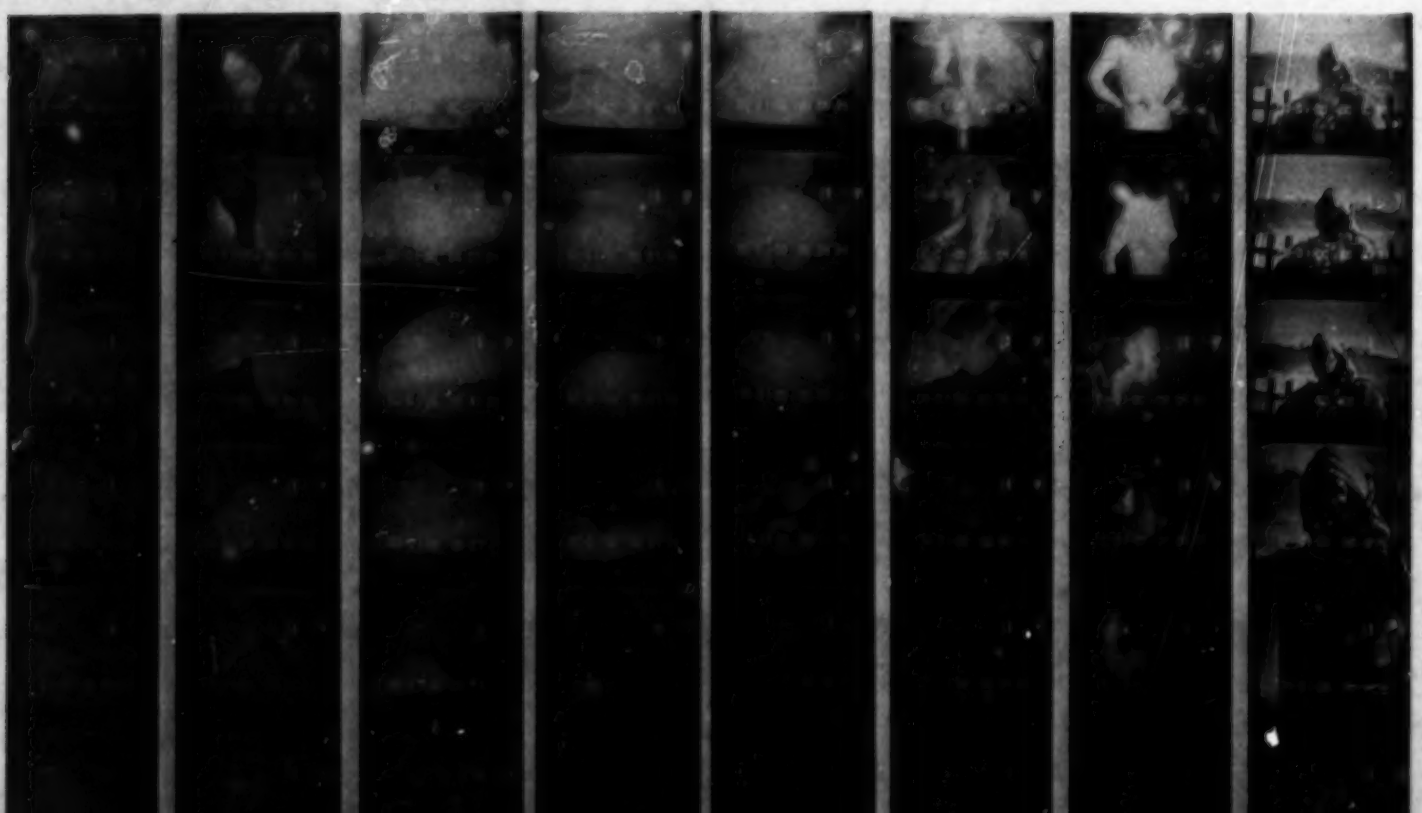
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"INSIDE MARILYN CHAMBERS"
PART 6 OF 14 PARTS
(27:55-29:19) SEXUAL INTERCOURSE. (29:22-30:04) DEPICT ARTIE MITCHELL DIRECTING PORNOGRAPHIC SCENES. (30:07-31:14) SCENES NOT SHOWN IN "RESURRECTION OF EVE" DEPICTING NUDE ACTORS. (31:17-32:02) ANOTHER MALE ACTOR SHOWN AND MARILYN CHAMBERS CONTINUES INTERVIEW. (32:06-33:26) SCENES FROM "BEHIND THE GREEN DOOR."

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





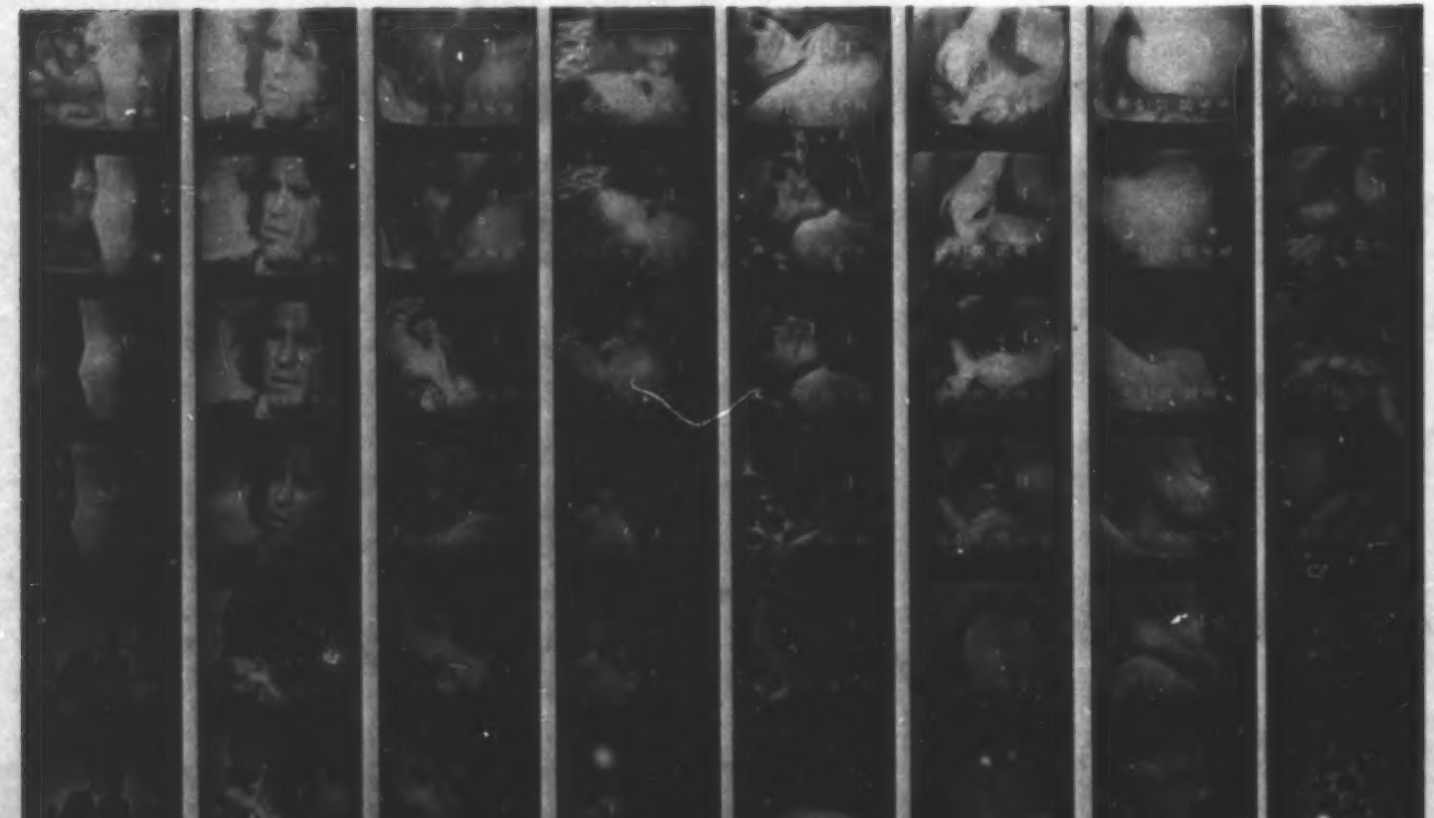
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"INSIDE MARILYN CHAMBERS"
PART 8 OF 14 PARTS
(39:04-41:13) SEXUAL INTERCOURSE AND FELLATIO. (41:16-44:35) SHOW VARIOUS NUDE SCENES, CUNNILINGUS BETWEEN TWO FEMALES, PLUS SEXUAL INTERCOURSE BETWEEN A MALE AND FEMALE FROM THE REAR.

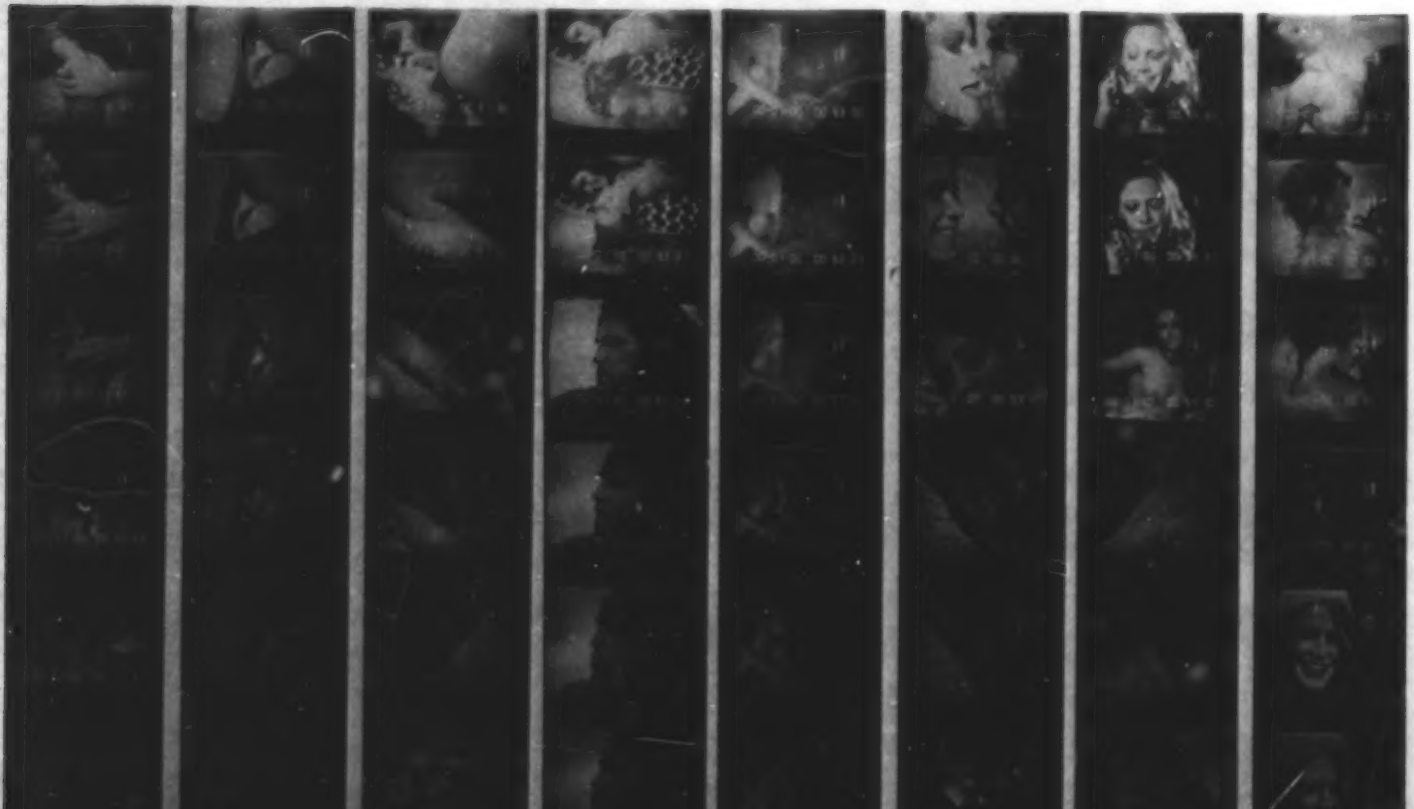
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"INSIDE MARILYN CHAMBERS"
PART 9 OF 14 PARTS
(44:38-44:49) MARILYN CHAMBERS AND A MALE ENGAGED IN FELLATIO AND CUNNILINGUS. (44:52-45:30) MALE ACTOR IS INTERVIEWED. (45:34-50:09) MALE ACTOR AND CHAMBERS ENGAGE IN SEXUAL INTERCOURSE, BREAST LICKING AND FELLATIO.

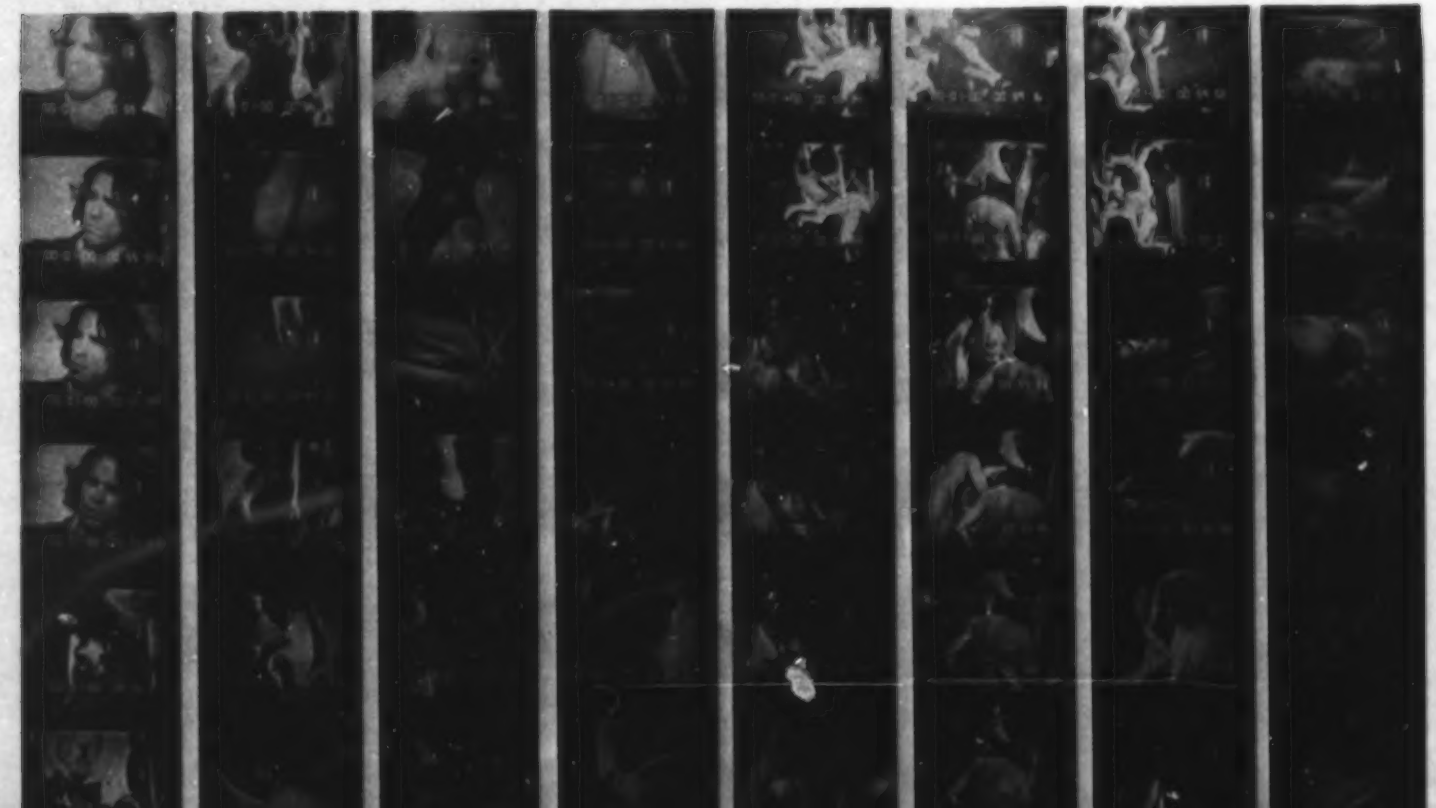
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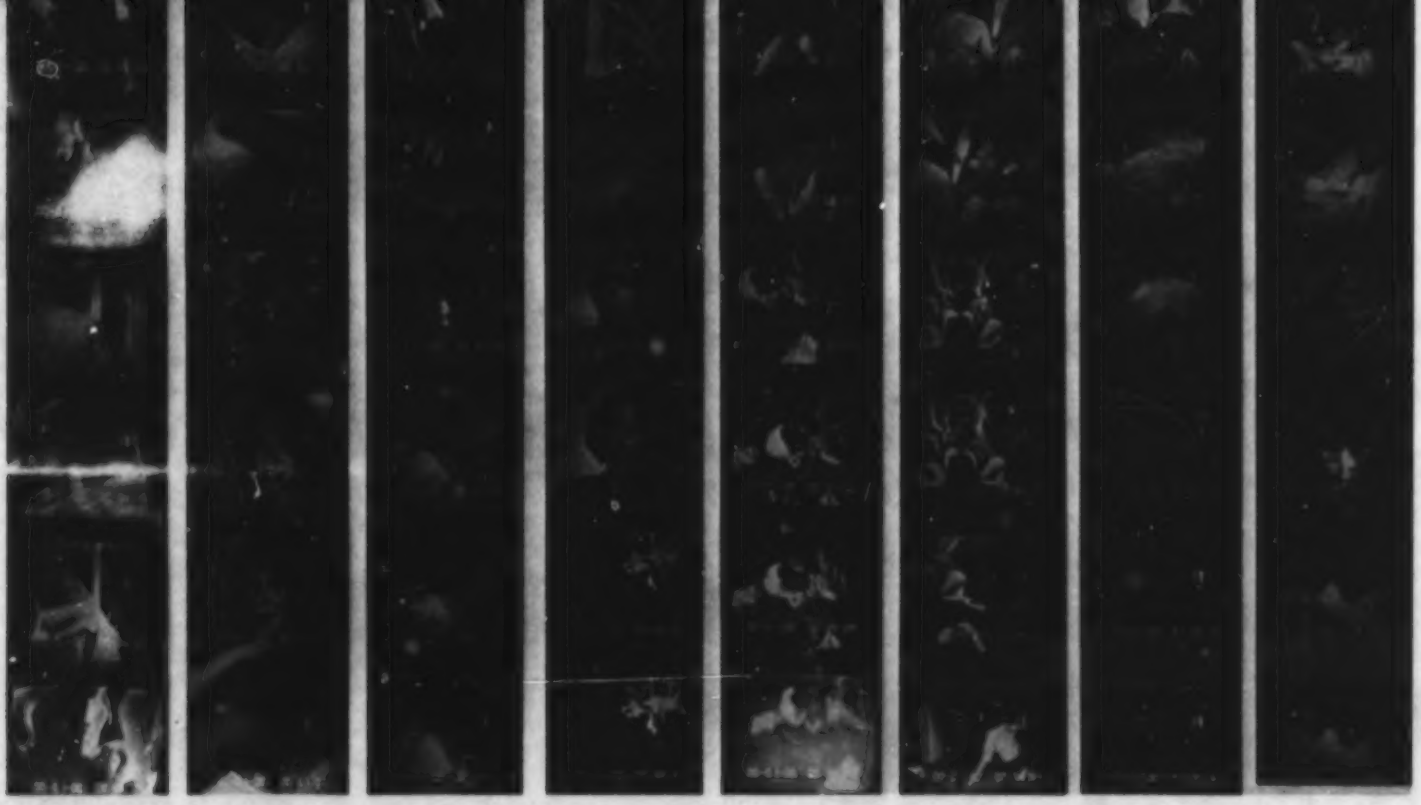




"INSIDE MARILYN CHAMBERS"
PART 10 OF 14 PARTS
(50:12-52:21) MARILYN CHAMBERS CONTINUES FELLATIO, CUNNILINGUS, AND SEXUAL INTERCOURSE SCENES. (52:25-52:35) MALE ACTOR STILL BEING INTERVIEWED. (52:39-54:27) SEXUAL SCENES CONTINUE WITH MARILYN CHAMBERS INTERVIEWED AND TALKING ON THE PHONE. (54:30-55:43) MARILYN SHOWN NUDE LOOKING IN A MIRROR AND LAUGHING.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





"INSIDE MARILYN CHAMBERS"
PART 11 OF 14 PARTS
(55:47-57:04) THE MALE ACTOR TALKS AS MARILYN CHAMBERS' INTERVIEW CONTINUES. (57:07-101:18) VARIOUS SCENES OF MARILYN CHAMBERS ENGAGING OTHERS IN SEXUAL ACTIVITY.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18, 1976).





"INSIDE MARILYN CHAMBERS"
PART 12 OF 14 PARTS
(E01:21-E02:03) FELLATIO SHOWN AS INTERVIEWS CONTINUE OF ACTORS INVOLVED WITH CHAMBERS IN "BEHIND THE GREEN DOOR." (E02:47-E06:52) MALE ACTOR CONTINUES TO DISCUSS SCENES OF "BEHIND THE GREEN DOOR."

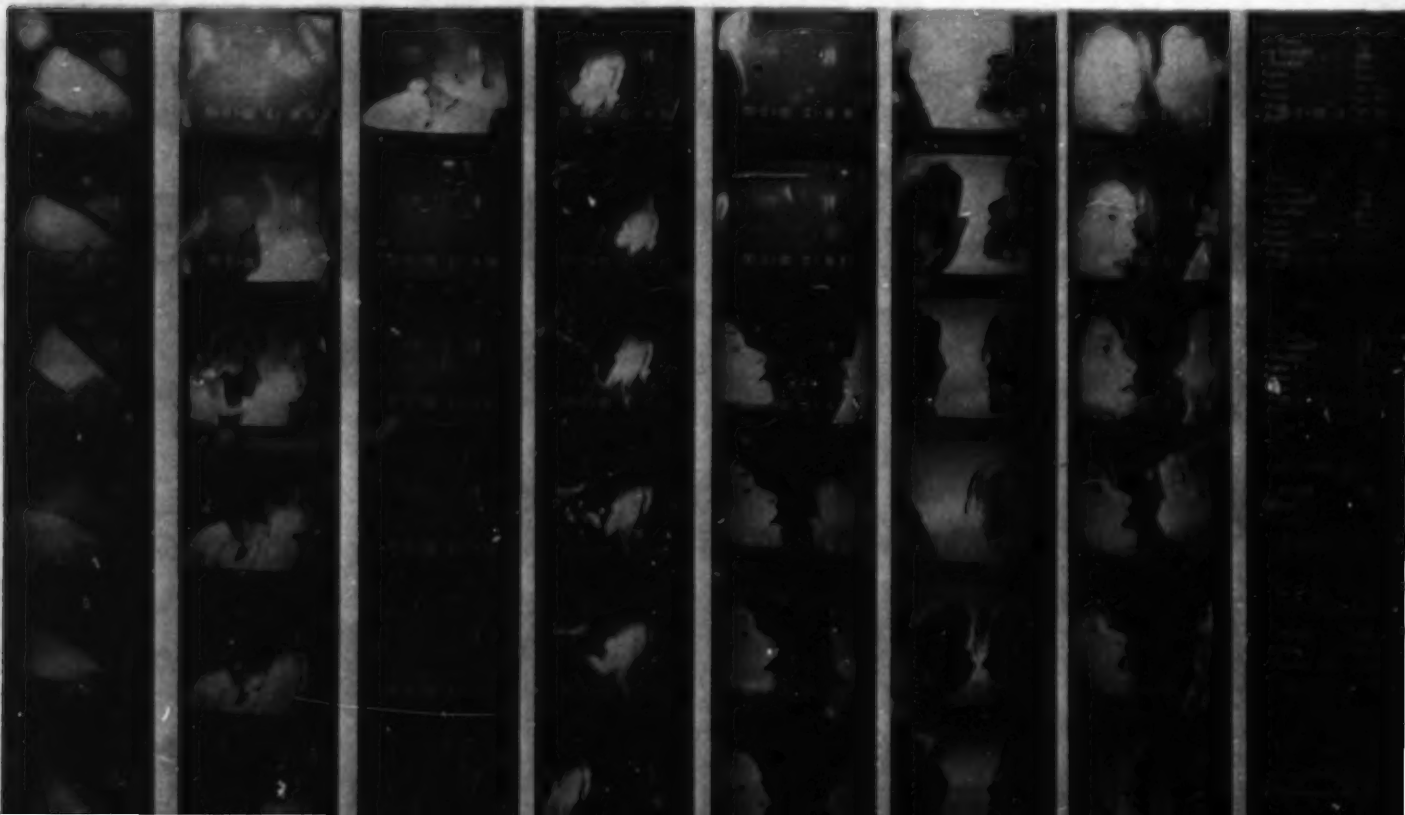
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"INSIDE MARILYN CHAMBERS"
PART 13 OF 14 PARTS
(1:06:56-1:12:27) DEPICT MARILYN CHAMBERS AND MALE ACTOR BEING INTERVIEWED SEPARATELY. NUDE SCENES FROM "BEHIND THE GREEN DOOR" ARE SHOWN.

"INSIDE MARILYN CHAMBERS": CERTIFICATE OF REGISTRATION OF A CLAIM TO COPYRIGHT (REG. NO. M.P. 30483) WAS ISSUED BY THE REGISTER OF COPYRIGHTS TO CINEMA 7, INC. (DATE OF ISSUANCE: NOV. 18





"INSIDE MARILYN CHAMBERS"
PART 14 OF 14 PARTS
(1:12:30-1:17:55) CONTINUED SCENES FROM "BEHIND THE GREEN DOOR." - THE TRAPEZE SCENES WITH FELLATIO AND CUNNILINGUS. EJACTULATION. CLOSING SCENE OF MARILYN CHAMBERS TALKING, THEN SHOWN NUDE AS CREDITS ARE SHOWN AS FILM ENDS.

Supplemental Brief

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

No. 81-2095

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,

Petitioners,

v.

JARTECH, INC., AMATUNA, INC., CINEMA 7, INC., and MOOKS, INC., all California corporations,

Respondents.

MOTION FOR LEAVE TO ADD, AS SUBSECTION (a) TO THE QUESTION PRESENTED IN THE PETITION FOR A WRIT OF CERTIORARI, A "SUBSIDIARY QUESTION FAIRLY INCLUDED" WITHIN THE AMBIT OF U.S. SUPREME COURT RULE 21.1

Come now the Petitioners to move for leave of Court to amend the Petition for Writ of Certiorari on file herein by adding, as subsection (a) to the "Question Presented" in said Petition, a "subsidiary question fairly included" within the ambit of U.S. Supreme Court Rule 21.1, reading as follows:

> (a) Whether a Court of Appeals is bound by the "clearly erroneous" rule of F.R.C.P. 52(a) in reviewing the "discretion" of the U.S. District Court to award an attorney's fee under 17 U.S.C. section 116 and the District Court's finding of fact that the filing of the copyright infringement lawsuit was intended by the Plaintiffs to intimidate the members of the City Council in the performance of their duties and was not a good faith effort fairly to resolve the legal question of copyright infringement".

Petitioners offer said amendment as a short and concise statement of a subsidiary question regarding the application of F.R.C.P. section 52(a), which was recently construed by this Court in a trademark infringement case, Inwood Laboratories, Inc., et

al. v. Ives Laboratories, Inc., ___ U.S. ___, 72 L.Ed.2d 602, 102 S.Ct. ___ (June 1, 1982), and upon which argument has already been made in Petitioners' Reply Brief on file with this Court.

Petitioners submit that the Inwood Laboratories, Inc. case as applied to the above framed subsidiary question (a) and the record herein, is dispositive of the primary "Question Presented" in the Petition for a Writ of Certiorari, regarding the right of the appellate court to interfere with the "discretion" accorded by Congress to the trial court to award a reasonable attorney's fee to the "prevailing party" in a copyright infringement lawsuit under 17 U.S.C. section 116. See, also, Sawyer v. Crowell Publishing Co., 142 F.2d 497, cert. den. 323 U.S. 735, 89 L.Ed.2d 589, 65 S.Ct. 74; International Luggage Registry v. Avery Products Corp., (1976, CA 9, Cal.), 541 F.2d 830; Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp., (1977, CA 9, Cal.), 562 F.2d 1157.

DATED: August 16, 1982

Respectfully submitted,

James J. Clancy
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I, hereby certify that on this 16th day of August, 1982, a copy of the within:

> Motion for Leave to Add, Subsection (a) to the Question Presented in the Petition for a Writ of Certiorari, a "Subsidiary Question Fairly Included" Within the Ambit of U.S. Supreme Court Rule 21.1

was deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the below listed party to the proceedings.

I further certify that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109

James J. Clancy
9055 La Tuna Cyn. Rd.
Sun Valley, CA 91352

Counsel for Petitioner.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2095

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,
Petitioners,

VS.

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC. and MOOKS, INC., all California Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT L. THORP
1524 California Street
San Francisco, CA 94115
(415) 441-3492
Attorney for Respondents

BOWNE-PERRAULT WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 863-1600

QUESTION PRESENTED

Whether the Court of Appeal committed a serious error of law when it refused to grant attorney's fees to copyright infringers who failed in asserting their defense that the copied works were obscene, but the defense of "fair use" was found to be not clearly erroneous?

LIST OF PARTIES

The petitioners are James J. Clancy, a private attorney who has specialized in bringing civil actions to stop exhibition of motion pictures, and Gordon Bricken, James E. Ward, David L. Brandt and David F. Ortiz, who, at all times relevant to this lawsuit, were members of the City Council of the City of Santa Ana, Orange County, State of California.

Respondents are Jartech, Inc., registered copyright holder of the motion picture, "Behind the Green Door"; Anatuna, Inc., registered copyright holder of the motion picture, "Resurrection of Eve"; Cinema 7, Inc., copyright holder of the motion pictures, "Sodom and Gomorrah", "The Autobiography of a Flea" and "Inside Marilyn Chambers"; and Mooks, Inc., copyright holder of the motion picture, "C. B. Mamas". All these respondents are California corporations, and all are controlled by James L. Mitchell and Artie J. Mitchell of San Francisco, California.

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No. 81-2095

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THE OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 666 F.2d 403, and a copy is attached to the petition as Appendix A-1.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on January 25, 1982. On April 12, 1982, Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including May 10, 1982. Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

17 U.S.C. Section 505. Remedies for infringement: costs and attorney's fees

In a civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

STATEMENT OF THE CASE

This is the second of three petitions brought in this copyright infringement suit. The other two are No. 81-2094, dealing with the defense of obscenity, and No. 81-2096, dealing with a purported cause of action for declaratory relief. This particular petition concerns the reversal of a grant of attorney's fees to the defendants.

In October, 1976, the respondents here ("The Mitchell Brothers") sued James J. Clancy and five members of the City Council of Santa Ana, California, for copyright infringement. Clancy had developed a technique for making "Time and Motion Studies," as he terms them (see the ex-

amples attached as Appendix D to the petition) by having an agent use a specially modified motion picture camera and a tape recorder to film and record the motion pictures being exhibited at the Mitchell Brothers Santa Ana Theatre.

Trial began before a jury in November, 1978, and Clancy and the Council members prevailed on their affirmative defenses that the films were obscene and thus not copyrightable, and that the copying was a "fair use." That decion was appealed.

Ten months later the district court entered judgment for the defendants for attorney's fees and costs totaling $23,157.11. The trial court's rationale for this award was that the same issue of obscenity as a defense had been decided against the Mitchell Brothers in a recent trial in the Northern District of Texas. The Mitchell Brothers appealed.

Shortly after the trial court's judgment on attorney's fees, the Fifth Circuit Court of Appeals filed the decision in the Texas case, *Mitchell Brothers Film Group v. Cinema Adult Theater* (5th Cir. 1979) 604 F.2d 852, *cert. den.* 445 U.S. 917, which held that a claim of obscenity was not a defense to copyright infringement.

The Ninth Circuit also reversed on the issue of obscenity, and on the award of attorney's fees, finding that the lawsuit was not frivolous, and the Mitchells' explanation for the suit reflected a sincere interest in settlement of close legal questions. *Jartech v. Clancy* (9th Cir. 1981) 666 F.2d 403 at 409.

THE PETITION PRESENTS ONLY A QUESTION OF FACT AND NOT A LEGAL ISSUE

The trial court, the Hon. Laughlin E. Waters, awarded the defendants attorneys fees and costs in the amount of $23,157.11. He believed that the prosecution of the case by the plaintiffs was frivolous because the plaintiffs had lost in the Northern District of Texas on the issue of whether obscenity was a defense to copyright infringement.

He entered judgment on those grounds on October 6, 1979. Ten days later, on October 16, 1979, the Fifth Circuit Court of Appeals filed its opinion in *Mitchell Brothers v. Cinema Adult Theatre* (5th Cir. 1979) 604 F.2d 852, *cert. den.* 445 U.S. 917, which reversed the ruling of the trial court and held that the claim of obscenity did not shield an infringer from the copyright laws.

On January 25, 1982, the Ninth Circuit agreed on the issue of the obscenity defense and reversed the award of attorney's fees, as it was patent that:

> "the Mitchells' prosecution of obscenity as a defense was not only not frivolous, but their position has ultimately been accepted. Furthermore, the Mitchells have offered explanations for their prosecution of this suit, which, in the opinion of this court, reflect a sincere interest in the settlement of close legal questions. The plaintiffs initiated this suit only after defendants had reproduced and used their registered properties in a manner which was arguably illegal." *Jartech v. Clancy,* 666 F.2d at 408.

When attorney's fees are awarded to a defendant in a copyright suit, it represents a penalty for the institution of a frivolous or bad faith suit. *Edward B. Marks Music*

Corp. v. Continental Record Co. (2d Cir. 1955) 222 F.2d 488, 493, *cert. den.* 350 U.S. 861; *Overman v. Loesser* (9th Cir. 1953) 205 F.2d 521, 524.

Professor Nimmer, reviewing the cases on the issue, says:

> "It has been said that the reason for awarding an attorney's fee is as much to penalize the losing party as it is to compensate the prevailing party. [Citation.] Therefore an attorney's fees generally will be awarded only where there is some element of moral blame against the losing party." 3 *Nimmer on Copyright, Fifth Edition*, Section 14.10[D], Pages 14-68, 14-69 (1980).

There is no dispute about this doctrine among the circuits, nor is it so patently wrong that this Court must intervene to correct it. Petitioners claim only that the facts of this case should be so decided that the doctrine would not apply. That is no ground for the grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for certiorari be denied.

Robert L. Thorp
Attorney for Respondents

Petitioner's Reply Brief

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No. 81- 2095

In the Supreme Court of the United States

October Term, 1981

JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,

Petitioners,

v.

JARTECH, INC., ANATUNA, INC., CINEMA 7, INC., and MOOKS, INC., all California corporations,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF

James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352
(213) 352-2069

Attorney for Petitioners.

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In the Supreme Court of the United States

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JAMES J. CLANCY, GORDON BRICKEN, JAMES E. WARD, DAVID L. BRANDT, and DAVID F. ORTIZ,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF

Pursuant to Rules 22.5 and 22.6 of the U.S. Supreme Court Rules, Petitioners file the following Reply and Supplemental Brief to the Respondents' "Opposition to Petition for a Writ of Certiorari" in No. 81-2095. The Supplemental Brief addresses itself to the implications of Inwood Laboratories, Inc., et al. v. Ives Laboratories, Inc., ___ U.S. ___, 72

L.Ed.2d 606, 102 S.Ct. ___, decided by this Court on June 1, 1982.

ARGUMENT

I

RESPONDENTS' "LIST OF PARTIES" MISSTATES THE TRIAL FACTS.

In their "Opposition to Petition for a Writ of Certiorari" in each of case nos. 81-2094, 81-2095 and 81-2096, Respondent Corporations Jartech, Inc., Anatuna Inc., Cinema 7, Inc. and Mooks, Inc., have incorrectly stated that the only interest of the Respondent "Mooks, Inc." is as "copyright holder of the motion picture 'C.B. Mamas'". Respondent "Mooks, Inc." and not Respondent "Cinema 7, Inc." is the copyright holder of the motion picture "The Autobiography of a Flea". This error is a harmless misstatement of the record except as to the Petition in No. 81-2096. Petitioner has responded to that misstatement in a Reply Brief in No. 81-2096, which is concurrently being filed with the

Reply and Supplemental Brief herein in 81-2095.

II

RESPONDENTS HAVE MISSTATED THE RATIONALE OF THE TRIAL COURT'S AWARD OF AN ATTORNEY"S FEE AS HAVING BEEN BASED UPON A FINDING THAT THE PLAINTIFFS' FILING OF THE ACTION WAS "FRIVOLOUS". ON THE CONTRARY, THE TRIAL COURT AWARDED THE FEE BECAUSE IT FOUND THAT THE LAWSUIT WAS FILED "TO INTIMIDATE" THE CITY COUNCIL MEMBERS AND CONCLUDED THAT IT WAS NOT A "GOOD FAITH" EFFORT TO RESOLVE THE LEGAL QUESTION, BUT WAS MEANT TO VEX AND HARASS THE MEMBERS OF THE CITY COUNCIL IN THE PERFORMANCE OF THEIR DUTIES.

In their "Opposition to Petition for a Writ of Certiorari", Respondents have misstated the Trial Court's rationale for granting an Attorney's Fee to the Petitioners. In their "Statement of the Case" at page 3, Respondents state that rationale to be:

> " Ten months later the district court entered judgment for the defendants for attorney's fees and costs totaling $23,157.11. The trial court's rationale for this award was that the same issue of obscenity as a defense had been decided against the Mitchell Brothers in a recent trial

in the Northern District of Texas. The Mitchell Brothers appealed."

In their argument at page 4, Respondents also state:

> " The trial court, the Hon. Laughlin E. Waters, awarded the defendants attorneys fees and costs in the amount of $23,157.11. He believed that the prosecution of the case by the plaintiffs was frivolous because the plaintiffs had lost in the Northern District of Texas on the issue of whether obscenity was a defense to copyright infringement." (Our emphasis.)

The record below clearly establishes that the above was not the rationale upon which the attorney's fee award was based. See, for example, the opinion of the Court of Appeals, in that regard, appearing in the Petition for a Writ of Certiorari at Appendix A-18:

> " The court based its award of fees to the defendants on the grounds that the same issue had been decided against the plaintiffs in a recent district court case in Texas and that the chronology of events led the court to believe that the suit was instituted for purposes of intimidation." (Our emphasis.)

In Finding of Fact 17, the trial

judge found that the plaintiffs had filed the lawsuit "to intimidate the members of the Council in the performance of their official duties insofar as plaintiffs' interests in these motion pictures and the Santa Ana Theater might be concerned." In Finding of Fact 20, the trial judge also found that "It would be inequitable to place the entire burden of the costs of this litigation on the taxpayers of Santa Ana." See Petition for a Writ of Certiorari in No. 81-2095 (Judgment for Costs Including Attorney's Fees on Claim, entered Nov. 5, 1979 - C.A. 80-5010) at Appendix B-17 and B-19. The court concluded (Conclusion of Law No. 2) that the lawsuit "was not a good faith effort fairly to resolve the legal questions presented" and that "The plaintiffs filed this lawsuit in order to vex and harass the defendants." See Petition for a Writ of Certiorari in No. 81-2095 (Judgment for

Costs Including Attorney's Fees on Claim, entered Nov. 5, 1979 - C.A. 80-5010) at Appendix B-21.

The difference between a finding that the filing of an action was "frivolous" and a finding that the filing of an action was intended "to intimidate" is like the difference between "night" and "day". The meanings of the words "frivolous" and "intimidate" are not the same. "Frivolous means of little weight or importance, not worth notice, or slight". U.S. v. Piper, D.C. Texas, 227 F.Supp. 735, 740. "Intimidate" means to inspire or affect with fear; to frighten; to make timid or fearful; to overawe or make afraid, and to restrain by threats. U.S. v. Baker, D.C. Cal., 129 F.Supp. 684, 685; Levy & Devaney v. International Pocketbook Workers' Union, 158 A. 795, 796, 114 Conn. 319; Long v. State, 12 Ga. 293, 320; Cox v. State, 167 S.E. 220, 46 Ga.App. 210;

Bayonne Textile Corp. v. American Federation of Silk Workers, Ch., 168 A. 799, 805, 114 N.J.Eq. 307. Further, the Plaintiffs brought the Fifth Circuit's decision in Mitchell Brothers' Film Group v. Cinema Adult Theater, 604 F.2d 852, to the trial court's attention after the court had made its "bad faith" Findings and Attorney's Fee Award. At that hearing, the trial court noted that there were other factors which justified the decision he was making. See Petition for a Writ of Certiorari in No. 81-2095 at page 60.

The trial court's finding that the filing of the lawsuit was intended "to intimidate" the City Council members is clearly supported by the record. See Statement of Facts in the Petition for a Writ of Certiorari in No. 81-2095 at pages 14-19, under the heading: "B. The Circumstances Surrounding the Filing of

the Federal Copyright Infringement Lawsuit on Oct. 12, 1976."

III

ASSUMING THE TEST APPLIED BY THE COURT OF APPEALS IS CORRECT; I.E., THAT A DEFENDANT IN A COPYRIGHT INFRINGEMENT LAWSUIT MAY BE AWARDED ATTORNEY'S FEES AS A "PREVAILING PARTY" ONLY WHERE THE PLAINTIFF HAS INSTITUTED A FRIVOLOUS OR BAD FAITH SUIT; STILL, THAT COURT WAS BOUND BY THE "CLEARLY ERRONEOUS" STANDARD OF F.R.C.P. RULE 52(a) AND IT WAS REVERSIBLE ERROR TO DISREGARD AND IMPLICITLY REJECT THE DISTRICT COURT'S CONCLUSION OF "BAD FAITH", BASED ON ITS FINDING THAT THE PLAINTIFFS' FILING WAS INTENDED TO "INTIMIDATE" THE CITY COUNCIL MEMBERS.

Petitioners have made the following arguments in their Petition for a Writ of Certiorari in 81-2095:

> (1) Under both the District Court and the Court of Appeals' decisions, the defendants were the "prevailing party".
>
> (2) In enacting 17 U.S.C. section 116, Congress granted the district court the "discretion" to grant a reasonable attorney's fee to the "prevailing party".
>
> (3) In exercising that "discretion", the trial court had applied the proper test; namely: (a) whether the Plaintiffs' claim is so lacking in

merit as to permit no arguable question of law or genuine issue of fact; (b) whether the real issue is whether the complaint was filed to vex and harass the defendants; (c) whether the facts established a cause in which the prevailing party should be compensated and the losing party penalized.

(4) The Court of Appeals' opinion failed to disclose any "abuse of discretion", but showed only a difference of opinion as to how the trial court evidence should be evaluated.

(5) There is no existing "copyright" case law which can be said to be controlling as to the award of attorney's fees. These trial facts demonstrate a case in which the losing party should be penalized.

In support of its arguments in paragraphs (3) and (4) of the above, Petitioners refer this Court to the trial facts and recent decision of this Court in Inwood Laboratories, Inc., et al. v. Ives Laboratories, Inc., ___ U.S. ___, 72 L.Ed.2d 606, 102 S.Ct. ___ (June 1, 1982) as further argument that the Court of Appeals erred in setting aside trial court Findings of Fact which were not "clearly

erroneous".

In the Ives Laboratories, Inc. case, supra, Ives, as the holder of a trademarked drug, brought a federal action against a manufacturer, Inwood Laboratories, Inc., alleging infringement of trademark under sections 32 and 43(a) of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. section 1114. The U.S. District Court concluded, after trial, that Inwood Laboratories, Inc. was not vicariously liable under section 32 for infringement of the trademark by pharmacists. Its conclusion was based upon findings that there was no direct evidence that the petitioners intentionally induced trademark infringement by the pharmacists, because the defendant manufacturer's catalogues and promotional materials could not fairly be read to suggest trademark infringement. The U.S. District Court also found that there was no

circumstantial evidence that Inwood Laboratories, Inc. had implicitly suggested that pharmacists substitute improperly. The trial court then reviewed the circumstantial evidence of incidents of mislabeling and concluded that such incidents occurred too infrequently to justify the inference that Ives' catalogs and use of imitative colors had "implied invited" druggists to mislabel; and that such mislabeling as did occur resulted from the pharmacists' misunderstanding of the law rather than an attempt to "pass off". The U.S. District Court also found that Ives failed to establish its claim under §43(a), based upon a finding that Inwood Laboratories' use of the blue and blue-red colors were functional and that Ives had not shown that the use of such colors by Ives had acquired a secondary meaning.

Without expressly stating that the

District Court's findings were clearly erroneous, the U.S. Court of Appeals for the Second Circuit reversed, holding that the evidence showed that Inwood Laboratories, Inc. had violated section 32 of the Lanham Act. On appeal, this Court, in an opinion by Associate Justice O'Connor, concurred in by 5 other justices, addressed itself to the Court of Appeals' Findings of Fact and Conclusions of Law. As to the Court of Appeals' explanation that the trial court failed to give sufficient weight to the evidence which Ives offered to show "a pattern of illegal substitution and mislabeling in New York", this Court held, at page 616:

> ". . . By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the instances of mislabeling were not clearly

> erroneous they should not have been disturbed."

After noting that the Court of Appeals' conclusion that the evidence was "clearly sufficient to establish a §32 violation" was influenced by four factors:

> ". . . First, it thought petitioners reasonably could have anticipated misconduct by a substantial number of the pharmacists who were provided imitative, lower-priced products which, if substituted for the higher-priced brand name without passing on savings to consumers, could provide an economic advantage to the pharmacists. Ibid. Second, it disagreed with the trial court's finding that the mislabeling which did occur reflected confusion about state law requirements. Id., at 544. Third, it concluded that illegal substitution and mislabeling in New York are neither de minimis nor inadvertent. Ibid. Finally, the Court of Appeals indicated it was further influenced by the fact that petitioners did not offer 'any persuasive evidence of a legitimate reason unrelated to CYCLOSPASMOL' for producing an imitative product."

this Court concluded at page 618:

> " Each of those conclusions is contrary to the findings of the District Court. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing

> court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' United States v. Real Estate Boards, 339 U.S. 485, 495, 94 L.Ed. 1007, 70 S.Ct. 711 (1950)."

In Inwood Laboratories, Inc., supra, this Court commented on the Court of Appeals' statement that 'petitioners did not offer 'any persuasive evidence of a legitimate reason unrelated to CYCLOSPAMOL' for producing an imitative product", as follows, at page 618 :

> " 20. The Court of Appeals reached that conclusion despite the District Court's express finding that, for purposes of §43(a), the capsule colors were functional. See p. ___, 72 L.Ed.2d 615, supra. As the dissent below noted, the Court of Appeals' majority either disregarded the District Court's finding of functionality, see 638 F.2d, at 545, n. 1 (Mulligan, J., dissenting), or implicitly rejected that finding as not 'persuasive.' See id., at 547.
>
> While the precise basis for the Court of Appeals' ruling on this issue is unclear, it is clear that the Court of Appeals erred. The appellate court was not entitled simply to disregard the District Court's finding of functionality. While the doctrine of functionality

> is most directly related to the question of whether a defendant has violated §43(a) of the Lanham Act, see generally Note, The Problem of Functional Features: Trade Dress Infringement Under Section 43(a) of the Lanham Act, 12 Colum.L.Rev. 77 (1982), a finding of functionality may also be relevant to an action involving §32. By establishing to the District Court's satisfaction that uniform capsule colors served a functional purpose, the petitioners offered a legitimate reason for producing an imitative product.
>
> Nor was the Court of Appeals entitled simply to dismiss the District Court's finding of functionality as not 'persuasive.' If the District Court erred as a matter of law, the Court of Appeals should have identified the District Court's legal error. If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous." (Our emphasis.)

For the same reason, the judgment of the Court of Appeals below must be reversed. The Court of Appeals' conclusion herein that the filing of the Plaintiffs' lawsuit was in "good faith" is contrary to the trial court's findings of fact that the Plaintiff had filed the lawsuit to intimidate the City Council members and

that it would be inequitable to place the entire burden of the costs of the litigation on the taxpayers of Santa Ana and its conclusion of law that the lawsuit was not a good faith effort fairly to resolve the legal questions presented and that the Plaintiff had filed the lawsuit in order to vex and harass the Defendants. Not only did the Court of Appeals below fail to find such factual finding to be clearly erroneous, as required by Rule 52(a), but, as in Inwood Laboratories, Inc., supra, it also disregarded and ignored the District Court's factual finding of "intimidation" and its conclusion of law thereon that the filing of the lawsuit was to "vex and harass" the City Council members.

Petitioners submit that, under the principle of law expressed by this Court in Inwood Labortories, Inc., et al. v. Ives Laboratories, Inc., supra, the

judgment of the Court of Appeals should be reversed and the case remanded with a direction that the findings of the trial court were not clearly erroneous, that the discretion of the trial court awarding an attorney's fee as a part of costs had been properly exercised, and that the Trial Court's Judgment should be reinstated.

August 9, 1982

Respectfully submitted,

_____

James J. Clancy
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I, hereby certify that on this ____ day of August, 1982, the original and 40 copies of the within Reply and Supplemental Brief were deposited in the United States Post Office in Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

LAW OFFICE OF ROBERT L. THORP
1524 California Street
San Francisco, California 94109

James J. Clancy
9055 La Tuna Cyn. Rd.
Sun Valley, CA 91352

Counsel for Petitioner.